Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1994

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,
Respondent,

vs.

LAKEWOOD ENGINEERING & MFG. CO., INC.,
Petitioner.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, contrary to established precedent, an NLRB representation election should be set aside because union agents used and openly displayed a camera at two polling places on election day without contemporaneously explaining the purpose of the picture-taking to employees?

Whether, contrary to established precedent, evidence of employees' subjective reactions to incidents of alleged objectionable conduct is required to establish misconduct and to overturn an NLRB representation election?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were the National Labor Relations Board, Local 743, International Brotherhood of Teamsters, AFL-CIO, and Lakewood Engineering & Mfg. Co., Inc.[1]

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[1]Petitioner is not associated with a parent company or any non-wholly owned subsidiaries.

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No.

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NATIONAL LABOR RELATIONS BOARD,

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LOCAL 743, INTERNATIONAL BROTHERHOOD
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LAKEWOOD ENGINEERING & MFG. CO., INC.,

Petitioner.

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in this case on June 23, 1994.

OPINIONS BELOW

This Petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit reported at 28 F.3d 1216 (Table), *unpublished opinion*, 1994 WL 283611 (7th Cir. June 23, 1994). It appears in Appendix A, *infra* (App. 1a-40a). The National Labor Relations Board decisions and the Hearing Officer's report and recommendations on

objections are reported at 310 N.L.R.B. No. 200, 143 L.R.R.M. (BNA) 1191 (1993), and are set forth in Appendices B, C and D *infra* (App. 41a-152a).

JURISDICTION

The decision of the Court below issued on June 23, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Sections 7 and 8(a)(1) and 8(a)(5) of the National Labor Relations Act (hereinafter referred to as "the Act"), 29 U.S.C. §§157, 158(a)(1) and 158(a)(5), provide as follows:

> §157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also

have the right to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in §158(a)(3) of this title.

§158(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE

At issue in this case is whether the unexplained picture-taking by union agents at two polling places on the day of a representation election reasonably tended to interfere with employee free choice. Also at issue, is whether evidence of the employees' subjective reaction to the picture-taking was required to establish the Union's objectionable conduct.

A.

The Facts

The Board conducted a representation election on April 3, 1992, utilizing four of Lakewood's plants as polling places (App. 66a). A majority of the employees

cast their votes in the union's favor (App. 64a). Lakewood objected to the election results claiming the union engaged in conduct that tainted the election results (App. 64a).

The objection at issue in this petition concerns the union's conduct, particularly its picture-taking, at two of the plants located on Sacramento Boulevard and Carroll Streets in Chicago, Illinois. With regard to the Company's main plant at Sacramento Boulevard, during the morning of April 3rd, union supporters gathered near the driveway leading to the employee parking area and adjacent to the polling area which was located just inside the building

immediately abutting the driveway. The Union-led crowd slowed the cars of employees coming to work, handed out union pennants, beating on cars, and urged employees to vote for the Union (App. 103a, 111a). A union organizer, Alicia Padilla, stood outside and shouted into a microphone (App. 103a). A union-employed organizer, Rico Cristo, testified that he distributed union pennants and took pictures of the union supporters and employees entering the plant while he stood near the driveway[2]

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[2]Conveniently the Union claims that the photographs taken at Sacramento Boulevard were inadvertently exposed by another union organizer, Jose Galvan, when he took the camera from Cristo (App. 38a-39a).

(App. 105a-106a).

The same type of commotion also occurred at the Carroll Street plant. The union admitted that approximately 20 people gathered across the street from the plant entrance (App. 95a). A witness testified that a megaphone was used to shout, "Teamsters!" (App. 87a). Photographs of employees were taken by the union at this location also. A union organizer, Jose Galvan, admitted that he took pictures in front of the entrance to the Carroll Street plant (App. 94a).

B.

The Seventh Circuit Decision

On June 23, 1994, the United States Court of Appeals for the Seventh Circuit

affirmed the National Labor Relations Board (hereinafter referred to as "the Board"). The Seventh Circuit was "troubled" by the fact that no contemporaneous explanation was given by the union when pictures were taken at the two polling places (App. 37a). Nevertheless, the Court found it "inappropriate" to set aside the election even though Board precedent seemed to require a contrary result (App. 38a). In its opinion, the Court recognized that "through the application of logic and the experiences of life" the courts and the Board have concluded that union photography has a coercive and intimidating effect on employees during

an election (App. 28a). Yet, logic and life experiences were not enough here because the Court found it significant that Lakewood did not produce any eye-witnesses to testify about their concerns or feelings over the union's picture-taking (App. 36a). Thus, according to the Court, whether the union's picture-taking was objectionable turned, in part, on the subjective reactions of employees. The Board and the Courts, however, have long held that complained-of conduct is analyzed objectively and the propriety of such conduct does not hinge on whether it succeeded in coercing employees.

REASONS FOR GRANTING THE WRIT

Under the veil of an unpublished opinion, the Seventh Circuit effectively reversed two well-established principles of the Board and its own precedent, namely: (1) unexplained picture-taking has a tendency to be coercive and intimidating in the context of an election; and (2) evidence of the subjective reactions of employees is irrelevant in determining whether election-related conduct is coercive. By doing so, the court did not fulfill its obligation to enforce the law as enunciated by the Seventh Circuit, by other Courts of Appeal and by the Board.

I.

BOARD PRECEDENT REQUIRES THE ELECTION TO BE SET ASIDE BECAUSE OF THE UNION'S UNEXPLAINED USE OF A CAMERA ON ELECTION DAY

It is undisputed that on the day of the representation election, union officials Galvan and Cristo took pictures and openly displayed a camera in the close vicinity of the polling places located at Lakewood's plants on Sacramento Boulevard and Carroll Street (App. 29a). The Board found that two employees had their picture taken as they looked out from a room next door to the polling place at Carroll Street (App. 117a). The Court noted the lack of any finding by the Hearing Officer and the

Board regarding whether this picture-taking had a coercive effect on employees (App. 8a).

At the Sacramento Boulevard plant, the Board and the Court completely overlooked and made no finding whatsoever concerning undisputed evidence that one of the union organizers took pictures of employees at the Sacramento Boulevard plant as they came to work (App. 179a-180a; App. 181a-182a).[3] It is undisputed that the union did not contemporaneously

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[3]Cristo testified that while he was taking pictures, he noticed that approximately 35 cars entered the driveway and that some of these cars and presumably their occupants were in the pictures as he pointed his camera in the direction of the driveway and Sacramento Boulevard (App. 179a-180a).

explain the purpose of its picture-taking to any employees who were at these two polling places (App. 29a-30a).

In its opinion, the Seventh Circuit pays lip service to the well established principle of the Board that "[i]n absence of a timely and plausible explanation for [the] intrusion with cameras, or perhaps even with an explanation, it is not unreasonable for a photographed voter to be intimidated and to be fearful and apprehensive of future union retribution" (App. 29a). As discussed by the Seventh Circuit, the Board in *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736 (1988), addressed the lawfulness of a union's picture-taking during a rally staged in front of

an employer's premises the day before an election. Two employees testified that they believed the union videotaped them as they exited the employer's premises. The employees were not given an explanation by the union for the videotaping. No threatening or violent behavior was observed at the time of the videotaping. In these circumstances, the Board found:

> [T]he videotaping intruded on the employees' Section 7 right to refrain from any or all union activities, including the union rally then in progress. *Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the Union was contemplating some future reprisals against them.* Clearly, such conduct would be intimidating and would reasonably tend to interfere with employee free choice

in the election.

Pepsi-Cola Bottling Co., 289 N.L.R.B. at 737 (emphasis added).

Likewise, the election day occurrences at the two Lakewood polling places also requires that the election results in this case be set aside. To put it charitably, the union organized "rallies" on election day directly outside the Sacramento Boulevard and Carroll Street polling places (App. 171a-172a). At Sacramento Boulevard, union official Cristo admitted he took photographs in and around an entranceway as 30 to 35 cars containing employees entered the plant where they would cast their votes (App. 179a-180a). Union

supporters banged on the windshields of cars as the cars entered the driveway and they distributed union pennants to the persons seated in the cars (App. 153a-156a). The Seventh Circuit opined that "it is rather obvious that any driveway that is partially blocked with human beings or other vehicles during a labor conflict is somewhat hazardous and can be intimidating" (App. 10a).

At Carroll Street, union official Galvan took flash pictures directly outside the polling place door (App. 175a-176a) and photographed two employees who were in a room that was right next to the polling place (App. 118a, 161a-162a). Just like in *Pepsi-Cola*, no explanation

for the picture-taking was given to any of the employees at the either the Sacramento Boulevard or Carroll Street polling places.

The United States Court of Appeals for the Eighth Circuit framed the Board's standard on the use of cameras as follows: "[I]n determining whether the filming of employees created a coercive atmosphere, the Board examines whether a legitimate explanation for the filming has been presented." *Millard Processing Services, Inc. v. NLRB*, 2 F.3d 258, 263 (8th Cir. 1993); *see also Mike Yurosek & Sons, Inc.*, 292 N.L.R.B. 1074 (1989) (a union official who took photographs with a small pocket camera at an employer

entrance gate resulted in the setting aside of an election where "no explanation was provided to employees while pictures were being taken to assuage their fears that the pictures would be the basis for future reprisals"). This is the standard which must be applied here. It requires that the election be set aside because, without an explanation from the union, the picture-taking created a coercive atmosphere at the polling places.

The Seventh Circuit noted in its opinion that the Board dismissed as "isolated" the fact that two employees had their picture taken while they peered out of a window next to the polling place

(App. 31a). Additionally, the Court did not address the undisputed evidence of picture-taking by the union at the Sacramento Boulevard polling place (App. 179a-180a; App. 181a-182a). Yet, in *Pepsi-Cola*, in similar circumstances, the Board expressly refused to find the union's picture-taking to be isolated. *Pepsi-Cola*, 289 N.L.R.B. at 737 n.4.

Moreover, the Board and Courts have long recognized that pre-election campaign activity is likely to receive prompt and wide circulation.

> Therefore, to evaluate properly the probable effect of conduct which is coercive in nature, *the number of employees directly involved cannot serve as a determinative factor.* The controlling factor here is

> whether the conduct involved tends to interfere with a free and uncoerced choice by the employees.

Intercontinental Mfg. Co., 167 N.L.R.B. 769 (1967) (emphasis added), *quoted in Home Town Foods, Inc. v. NLRB*, 416 F.2d 392, 399 n.14 (5th Cir. 1969).[4]

Contrary to its own standard, the Board in this case determined that because only two employees had their pictures taken, the union's conduct did not have a tendency to interfere with the employees' free and uncoerced election choice. Furthermore, there is no explanation why the Board did not

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[4]The final tally in the instant election was 312 votes for and 197 votes against the union, with 37 uncounted challenged ballots (App. 64a).

consider the picture-taking at the Sacramento Boulevard location.

Under the assumption, *arguendo*, that the number of employees can be determinative, the camera was not used in an isolated manner. It is undisputed that the camera was used throughout the voting periods at two polling places (App. 157a-158a, 159a-160a, 173a-174a, 175a-176a, 177a-178a, 179a-180a, 181a-182a). These incidents were anything but isolated.

Significantly, the Seventh Circuit did not adopt the Board's reliance on the Union's victory margin to somehow excuse the Union's misconduct. Although the margin of victory may be a factor in

assessing misconduct, it is certainly not the *only* factor. Indeed, if that were so, unions and employers would be encouraged to apply wide-spread strong-arm tactics just to ensure a large enough victory to withstand any objections. The Board has long recognized the need to avoid this kind of perverse incentive. For example, the Board did not require a close election as a condition for a non-majority bargaining order in *United Dairy Farmers Coop. Ass'n* because:

> Such a requirement might encourage an employer to escalate its misconduct in order to achieve an overwhelming election victory and avoid a bargaining order, thereby rewarding those who engage in the greatest misconduct.

257 N.L.R.B. 772, 775 n.22 (1981). This reasoning applies equally to the Union's misconduct in this case.

In any event, the vote was much closer than the Board might have this Court believe. Out of the 509 votes counted, 312 employees voted for the Union and 197 voted against the Union (App. 64a). Thus, with a difference of 115 votes, only 58, less than eleven per cent of the bargaining unit, would have changed the election results. This margin shrinks to just eleven votes -- *less than two per cent* of the unit -- when the 37 uncounted challenged votes are treated as possible votes for Petitioner. Clearly, the "margin of

victory" has no place in the analysis of the Union's misconduct.

Given the Board's standard on picture-taking, the Lakewood election must be set aside because the union officials did not explain why they were using the camera outside the polling places. As the Board has stated, without an explanation for the picture-taking, such conduct would reasonably tend to interfere with employee free choice in an election.

II.

THE SEVENTH CIRCUIT ERRONEOUSLY REQUIRED SUBJECTIVE EVIDENCE OF EMPLOYEE REACTIONS CONTRARY TO WELL-ESTABLISHED BOARD AND SEVENTH CIRCUIT PRECEDENTS

In its opinion, the Seventh Circuit reasoned that the picture-taking was not coercive because "Lakewood failed to produce any eyewitnesses to testify that he or she was concerned or made to feel uncomfortable by the Union's picture-taking. The two employees who were photographed in the tool room testified and neither stated that he felt threatened from the photography" (App. 36a). In other words, the court ruled that setting aside the election was unnecessary because there was no

subjective evidence that the picture-taking was intimidating in fact.

Contrary to the Seventh Circuit's ruling, no subjective evidence of the camera's coercive effect was necessary here. Just two years ago the Board explained in *Nu-Skin Int'l, Inc.*, 307 N.L.R.B. 223, 224 (1992), that the picture-taking in the *Pepsi-Cola* and *Mike Yurosek* cases was objectionable, but not because employees testified that they felt coerced. Instead, the Board found the picture-taking objectionable based on the fact that the circumstances were such that the employees "*might* well have felt that their responses to the union campaign activity were being recorded for

the purpose of future retaliation." *Nu-Skin*, 307 N.L.R.B. at 224 (emphasis added).

In point of fact, the Board has found picture-taking coercive despite subjective evidence to the contrary. For example, in *Sunbelt Mfg., Inc.*, 308 N.L.R.B. 780 (1992), *aff'd in part in an unpublished opinion*, 996 F.2d 305 (5th Cir. 1993), the union charged the employer with unlawfully interfering with the rights of employees when a manager videotaped employees at the front entrance to the plant on the day before an election. An employee testified that the employer videotaping did not discourage him from his union activities.

Counsel for the General Counsel of the Board argued that the videotaping "by its very nature, is coercive." *Sunbelt Mfg., Inc.*, 308 N.L.R.B. at 789. The Board agreed with the General Counsel that, without an explanation for the purpose of the videotaping to the general work force, the videotaping of employees tends to interfere with, restrain, and coerce employees in the exercise of their section 7 rights. *See also Holly Farms Poultry Indus., Inc.*, 186 N.L.R.B. 210, 213 (1970) (despite the lack of evidence that employees witnessed their pictures being taken, the Board found picture-taking unlawful on the basis that it could be reasonably inferred that

employees would learn that a photographer was taking pictures).

As the Seventh Circuit itself recognized (App. 28a), the Board and the Courts have found that picture-taking by its very nature has a tendency to be coercive. *See NLRB v. Associated Naval Architects, Inc.*, 355 F.2d 788, 791 (4th Cir. 1966) ("it is the fact of photographing itself that ha[s] the tendency in these circumstances to intimidate"); *Russell Sportswear Corp.*, 197 N.L.R.B. 1116 (1972), *enf. denied on other grounds*, 83 L.R.R.M. (BNA) 2225 (6th Cir. 1973) (the appearance of taking pictures with an unloaded camera coerced and restrained employees); *Brunswick*

Hospital Center, Inc., 265 N.L.R.B. 803, 808 (1982) (employers "photographing of the strikers tends to interfere with the employees' right to engage in protected activities"); *Larand Leisurelies, Inc.*, 213 N.L.R.B. 197(1974), *enforced* 528 F.2d 814 (6th Cir. 1975) (employer's conspicuous picture-taking was calculated for the coercive purpose of visiting future reprisals); and *Tennessee Packers, Inc.*, 124 N.L.R.B. 1117, 1123 (1958)(knowledge among employees that pictures are being taken "necessarily tends to interfere [with], restrain, and coerce the employees into abandoning their rights to engage therein as guaranteed in Section 7 of the

Act").

Any added requirement for subjective evidence on the feelings of the employees is just plain contrary to years of Board precedent. In 1947, the Board explained "that an examination of the subjective state of mind of employees, exposed both before and after an election to ... conduct of a kind which tends to coerce employees in the exercise of the right to make a free choice of representatives [does not provide] a proper test of the fairness of an election." *Pure Oil Co.*, 73 N.L.R.B. 1, 3 n.4 (1947) and cases cited therein.

More puzzling is the fact that the Seventh Circuit just three years ago

recognized that "that the Board has long held that it is impermissible to consider employee subjective reactions to determine whether employees have been threatened or coerced." *Van Leer Containers, Inc. v. NLRB*, 943 F.2d 786,789 (7th Cir. 1991). *See also Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991) (employer's argument that employee was not in fact coerced is a misstatement of the law because the court "look[s] at a remark's tendency to coerce, not at its actual impact"); *API Indus., Inc.*, 314 N.L.R.B. No. 118, *slip op.* (1994) (whether there was a violation does not turn on whether the coercion succeeded or failed but whether the

conduct reasonably tended to interfere with the free exercise of employee rights); *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1364 (9th Cir. 1981), *cert. denied*, 454 U.S. 835, 102 S.Ct. 137 (1981) ("interrogation violates the Act if it has a tendency to intimidate employees in the exercise of their protected rights, even if there is no evidence of actual intimidation"); *NLRB v. Brookwood Furniture, Division of U.S. Indus.*, 701 F.2d 452, 459 (5th Cir. 1983) (whether a statement violates the Act is determined by its tendency "to be coercive, not whether the employees are in fact coerced").

The United States Court of Appeals for the Fifth Circuit captured the reasoning behind the Board's objective, tendency-to-coerce test:

> We are aware that, in many instances, assessing the effect of a particular action on the electorate could be a difficult, if not impossible, task. This is because detecting the subjective reaction of employees to electioneering requires an expedition into the thought processes of the electorate, a journey that administrators and courts are ill-equipped to make. To eliminate this invitation to speculate, the Board should not attempt to plumb the subconscious. Rather, the assay should seek to find whether the questioned action by an election candidate had a tendency to influence the outcome of the voting. If the challenged action had a tendency to influence the outcome of the election, then

> the election should be invalidated.

NLRB v. Gulf States Canners, Inc., 585 F.2d 757, 759 (5th Cir. 1978).

A logical extension of the objective standard is the Board's well-established rule that "'the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.'" *Picoma Indus., Inc.*, 296 N.L.R.B. 498, 499 (1989), *quoting Emerson Electric Co.*, 247 N.L.R.B. 1365, 1370 (1980), *enforced* 649 F.2d 589 (8th Cir. 1981); *see also Electra Food Machinery, Inc.*, 279 N.L.R.B. 279, 280 (1986); *Janler Plastic Mold Corp.*, 186 N.L.R.B. 540 (1970) ("Nor do we consider that a particular

employee's *subjective* 'understanding' of these remarks is competent evidence to prove a coercive or objectionable effect, since in our opinion the remarks do not reasonably have that tendency").

During the hearing in this case, when the Company tried to elicit the subjective reactions of employees, the union objected and the Hearing Officer sustained the objection as being irrelevant. When one of Lakewood's witnesses characterized the rally as a "strike" and testified that people were "frightened" and "afraid," the union's objections were sustained (App. 165a-166a). When another Company witness testified that she was "shocked," this

also was objected to on relevancy grounds. (App. 167a-168a). The Hearing Officer explained his evidentiary ruling as follows: "I don't think it is pertinent. It is what she was thinking about. I certainly think it is irrelevant" (App. 169a-170a).

In summary, the Seventh Circuit cannot simply rubber stamp the Board when the Board departs, without explanation, from its own precedent regarding the coercive effect of the unexplained use of cameras during representation elections. Moreover, the Seventh Circuit's reliance on the fact that there was no record evidence of the subjective reactions of employees flies directly in the face of

well-established Board precedent. A *fortiori*, the Court should not be allowed to ignore its own precedent concerning these issues.

For these reasons, Lakewood requests that the Court review the decision of the Seventh Circuit and analyze the decision based on the appropriate objective standard regarding the unexplained use of photography during a representation election campaign.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 21, 1994

APPENDICES

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APPENDIX A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Argued February 15, 1994
June 23, 1994.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. JAMES B. MORAN, Chief District Judge*

Nos. 93-2771 & 93-2938	)	Application for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board.
NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner, Cross-Respondent,	)	
and	)	
LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,	)	
v.	)	
LAKEWOOD ENGINEERING & MANUFACTURING, INCORPORATED,	)	No. 13-CA-31381
Respondent, Cross-Petitioner.	)	

ORDER

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* Honorable James B. Moran, Chief Judge of the Northern District of Illinois, is sitting by designation.

The National Labor Relations Board (the Board) petitions this court for the enforcement of its Decision and Order of April 23, 1993, requiring Lakewood Engineering & Manufacturing Company, Inc. (Lakewood) to bargain with intervening petitioner Local 743, International Brotherhood of Teamsters, AFL-CIO (the Union), certified as the exclusive bargaining representative of Lakewood's employees following a Board-supervised election. Lakewood cross-petitions, seeking to set aside the order on the grounds that the Union allegedly intimidated voters during the election. We enforce the Board's Order.

BACKGROUND

Lakewood Engineering and Manufacturing, Inc. produces electric fans, heaters, and

Christmas tree stands at various sites in Chicago, Illinois. On April 3, 1992, a Board-supervised election was conducted to determine whether the Union was to act as the employees' exclusive bargaining representative.[1] The final tally was 312 votes in favor of Union representation and 197 against it, while thirty-seven votes were challenged and determined to be invalid or improper.

Lakewood filed objections to the election's results with the NLRB, claiming it had "discovered objectionable conduct on the part of the Teamsters

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1 The employees who voted were "[a]ll full-time production, maintenance, tool room and warehouse employees employed at the Employer's facilities no located at 1901-45 W. Carroll Street, 1756 W. Lake St., 501 N. Sacramento St., 212 N. Carpenter St., and 315 N. Racine, Chicago, Illinois[.]"

Local No. 743 which affected the results of the April 3 election." Lakewood alleged that at two of the polling stations, on Carroll Street and Sacramento Street, "Union supporters amassed outside the polling place" and "at all times they were observing, threatening and otherwise coercing employees." Specifically, Lakewood claimed that Union supporters threw stones at two employees (Canamar and Zdzairski) as they left the Carroll Street voting site, shouted slogans with the use of a bullhorn, and photographed employees as they approached and left both the Carroll and Sacramento polling stations, all in an attempt to intimidate voters and prevent them from exercising their free choice. Lakewood also argued

that an angry and violent mob of some fifty Union supporters partially blocked the driveway leading to the Sacramento Street parking area by forcing cars to slow down.

Based upon Lakewood's allegations, the NLRB assigned a hearing officer to take testimony and make findings and recommendations. With respect to the Carroll Street activities, the hearing officer, relying on the testimony of witnesses Herrera, Canamar, Stanislawski, and Padilla, found that there were "approximately twenty" Union supporters present during the polling period, not fifty as claimed, and that the rally "was not being held to urge employees to vote for the [Union] but rather was in the form of a pep rally for supporters before

the ballot count." Although the noise created by the Union supporters (shouting and music) could be heard inside the polling area, "neither of the witnesses who testified ... [stated that] they could hear with any specificity what was said or that it interfered with conversation inside the polling place." The hearing officer also rejected the cross-petitioner's contention that stones were thrown at Zdzairski as he walked from the Carroll Street polling station to employee Canamar's van, finding that Zdzairski was not a credible witness and observing that no one else had testified that anything was thrown at Zdzairski. However, the NLRB hearing officer did find that an object was thrown at Canamar's van as he and Zdzairski drove

away. This finding is at best questionable for it is just as likely that the object was thrown at the passengers inside the vehicle, rather than at the vehicle itself. The hearing officer concluded that the throwing incident had no "coercive effect" on the election because it "involved only two employees out of 540, occurred after they had voted, and could not have been disseminated among any employees as this was the last polling session and only polling place open." One is left to contemplate as to whether the throwing of stones would indicate future violence which in turn might very well have intimidated others who either saw or heard about the stone-throwing incident and had not as yet cast their ballots.

In addition, the NLRB officer found that Jose Galvan, a Union supporter, took pictures during the rally at the Carroll Street location, but did so, according to his testimony, for the purpose of including the pictures in the Union publication; the hearing officer concluded that taking pictures of Union supporters did not constitute objectionable conduct. Although he recognized that Galvan had also taken a photograph of employees not participating in the rally, the factfinder failed to make any findings as to whether the taking of this picture had a coercive effect on other employees.

With respect to the Sacramento Street activities, the hearing officer found that according to the testimony he

relied upon, the Union had eight to twelve "representatives and supporters" present and that "these people were waving [Union] banners and urging employees to vote for the [Union]." In his reasoning he explained that rather than being a mob-scene, as stated in the pleadings, the Union supporters simply held a rally as they had done at the Carroll Street facility. In response to Lakewood's contention that Union supporters partially blocked the driveway leading to the Sacramento Street polling station and forced cars to slow down, the hearing officer stated, "Only one witness, Sylvia Garcia, testified that the driveway was ever blocked. In view of the overwhelming testimony of all other witnesses I do not credit Garcia's

testimony that the driveway was blocked by [Union] supporters." However, it is to be noted that Garcia did not testify that the driveway was blocked but only that the driveway was partially blocked, and it is rather obvious that any driveway that is partially blocked with human beings or other vehicles during a labor conflict is somewhat hazardous and can be intimidating. Finally, the hearing officer found that although another Union supporter, Rico Cristo, had also taken pictures, the camera was used to photograph Union supporters, and that there was no evidence that Cristo photographed employees approaching the Sacramento polling station or anyone

other than Union supporters.[2] The hearing officer recommended to the Board that the Union be certified as the Lakewood employees' exclusive collective bargaining representative.

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[2] Thus, there were two Union photographers (Galvan and Cristo) taking pictures at two different sites (Carroll Street and Sacramento Street). Galvan's pictures of the Carroll Street activities were admitted into evidence at the hearing. However, Cristo's pictures (of the Sacramento Street activities) were not introduced into evidence because Cristo's film according to the Union was allegedly exposed to light and supposedly destroyed. At the hearing, Lakewood argued that the Union or Cristo purportedly destroyed the film, but the hearing officer found that the film was ruined "inadvertently[.] . . . I base this finding on my observation of the demeanor of Galvan and Cristo while testifying and the fact that the [Union] had no hesitancy to introduce into evidence the photographs it took at the Carroll Street facility the evening of April 3 and the admission that Cristo was taking photographs at 601 N. Sacramento that morning."

Lakewood objected to the hearing officer's findings of fact and recommendation. On November 4, 1992, a three-member panel of the Board adopted the hearing officer's findings and recommendations and certified the Union as the employees' collective bargaining representative. In response to the employer's assertion that Galvan's photograph of the employees in the darkened tool room required that the election be set aside, the Board stated that "the single photo... was an isolated event that does not warrant setting aside the election." After being so certified, the Union attempted to bargain with Lakewood, but Lakewood refused to bargain with the Union or provide the Union with bargaining-related information.

Subsequently the Union filed an unfair labor practice charge with the Board alleging that Lakewood, in refusing to bargain with the Union, violated section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158 (a)(1) and (5). Following a hearing the Board ordered Lakewood to bargain with the Union. Lakewood Engineering and Mfg. Co. v. Warehouse, Mail Order, Office, Technical, and Professional Employees Union, Local 743, a/w International Brotherhood of Teamsters, AFL-CIO, 310 N.L.R.B. No. 200 (April 23, 1993). Lakewood appeals.

ISSUES

Lakewood's challenge to the propriety of the Board's order certifying the Union as the employees' exclusive collective bargaining representative centers on two related questions: 1) whether substantial evidence supports the Board's determination that the Union's activities at the Sacramento and Carroll Street polling areas did not coerce or intimidate voters; and 2) whether certification was proper in light of the Union agents' use of cameras in the area of the polling stations.

DISCUSSION

Standard of Review

In N.L.R.B. v. WFMT, 997 F.2d 269 (7th Cir. 1993), we reiterated the

standard of review, derived from 29 U.S.C. §160(e), for considering a petition by the Board for enforcement of an order requiring employers to bargain with certified collective bargaining representatives. We stated that:

> 'The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.' Thus, our 'review of the Board's order is sharply limited.' Livingston Pipe & Tube, Inc. v. NLRB, 987 F.2d 422, 426 (7th Cir. 1993). 'We must uphold the Board's determination if its factual findings are supported by substantial evidence in the record as a whole and its legal conclusions have a reasonable basis in the law .... Substantial evidence in this context means such relevant evidence as a reasonable mind might accept as adequate to support the Board's determination. Id. (citation omitted). This standard 'does not allow us to dabble in fact-finding and we may not displace

> reasonable determinations simply because we would have come to a different conclusions if we reviewed the case de novo.' Id. (quoting N.L.R.B. v. P*I*E Nationwide, Inc., 923 F.2d 506, 513 (7th Cir. 1991)). We must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life. Id. (citation omitted). We are bound to 'uphold the legal conclusions of the Board unless they are irrational or inconsistent with the National Labor Relations Act.' National Labor Relations Board v. Augusta Bakery, 957 F.2d 1467, 1471 (7th Cir. 1992) (citation omitted).

WFMT, 997 F.2d at 274. Finally, we note that the results of a Board-supervised representation election are presumptively valid and that the objecting party bears the burden of establishing that the election is invalid. Id. (citing NLRB v. Mattison Machine Works, 365 U.S. 123, 124, 81 S.Ct. 434, 435, 5 L.Ed.2d 455

(1961); N.L.R.B. v. Service American Corp., 841 F.2d 191,195 (7th Cir. 1988)). As the objecting party, Lakewood must demonstrate not only that unlawful acts occurred, but that those acts interfered with the employees' exercise of free choice "to such an extent that they materially affected the results of the election." WFMT, 997 F.2d at 274 (citing N.L.R.B. v. Chicago Tribune Company, 943 F.2d 791,794 (7th Cir. 1991), cert. denied, 112 S.Ct. 2301 (1992)).

A.

Initially, Lakewood contends that the "voters could not exercise free choice in the face of a loud, threatening mob." It complains that "for no apparent reason" the hearing officer rejected their contention that there were fifty

employees present at the Carroll Street facility, and it insists that employee Zdzairski was "pelted ... with stones and debris as he made his way to [Canamar's] van." Lakewood states that "[t]he mob action got so out of hand that during the afternoon session, the driveway actually was partially blocked ... resembl[ing] threatening picket-lines which many voters could not avoid on their way to the polls." It argues that "under the Board's view as represented by this case, it is acceptable for violence, threats and assaults to occur directly outside the polling place during the vote so long as the number of victimized voters is small enough." Lakewood argues that this evidence of Union-led intimidation and

coercion renders the Board's order unlawful.

As we will discuss below, there is some merit to Lakewood's arguments. However, Lakewood's argument that it presented substantial evidence in support of its position that the Union intimidated and coerced voters confuses the issue on appeal, for the question in this forum is not whether substantial evidence supports Lakewood's version of events, but whether substantial evidence supports the Board's determinations. See Chicago Tribune Co., 943 F.2d at 794 ("the party challenging the election has the burden of showing that substantial evidence does not support the Board's decision"). In addition, our standard of review regarding credibility

determinations is limited; a hearing officer's determinations of credibility and demeanor "may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its face incredible." Tuf-Flex Glass v. N.L.R.B., 715 F.2d 291, 295 (7th Cir. 1983). "If there is evidence to support two conflicting views, the Board's findings must be allowed to stand even though we might have reached a different conclusion on our own." N.L.R.B. v. Champ Corp., 933 F.2d 688, 691 (9th Cir. 1990), cert. denied, 112 S.Ct. 416 (1991).

In this case witnesses Herrera, Canamar, Stanislawski, and Padilla testified that the number of Union

supporters at the Carroll Street facility was approximately fifteen to twenty. While it is true that witnesses Brueck and Kyle testified that there were approximately fifty Union supporters present, it was for the hearing officer to resolve this conflicting evidence. In determining that the number of Union supporters present was fifteen to twenty, the hearing officer noted that "[Galvan's] photographs of the group show somewhere between fifteen and twenty, and while it is certainly possible that some individuals were not in the photograph[s], I do not believe there were as many as fifty as Brueck and Kyle testified." Given the testimony of Herrera, Canamar, Stanislawski, and Padilla, as well as the photographic

evidence received, we conclude that the hearing officer's determination as to the number of supporters at the Carroll Street facility is supported by the evidence.

With respect to the hearing officer's finding that the Sacramento Street driveway was not blocked, we note that this determination suffers from two defects: 1) it was not responsive to Lakewood's argument that the driveway was partially blocked (whether the driveway was partially or completely obstructed are two separate questions) and 2) it was grounded on a mistaken belief that the testimony of witness Garcia was inconsistent with other witnesses. Garcia testified that the Sacramento Street driveway was partially blocked

during one particular time period during the afternoon voting session, whereas witnesses Becara, Cristo, and Padilla testified that the driveway was not blocked during the morning session. The hearing officer failed to differentiate between the two separate and distinct time periods. However, we are cognizant that Garcia's testimony was that a driver had difficulty passing through the Union supporters on the Sacramento Street driveway, and that Garcia testified that she had no knowledge of whether the particular driver was a voting employee. As the party objecting to the presumptively valid election, Lakewood must demonstrate "not only that unlawful acts occurred, but that those acts interfered with the employees' exercise

of free choice 'to such an extent that they materially affected the results of the election'." WFMT, 997 F.2d at 274. Because Lakewood failed to meet its burden of producing sufficient probative evidence establishing that the Union supporters' afternoon activities interfered with the employees' exercise of free choice to such an extent that the election's results were materially affected, we conclude that Lakewood is not entitled to have the election set aside.

Finally, the hearing officer's finding that Zdzairski was not pelted by stones as he approached Canamar's van is supported by the evidence. We note that the hearing officer stated that "[Zdzairski's] testimony was inconsistent

on this point and by his demeanor on the stand he appeared to be enhancing the facts. Furthermore, there was no other testimony to support his assertion that anything was thrown at him." A hearing officer's determinations of credibility and demeanor "may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its face incredible[,]" Tuf-Flex Glass, 715 F.2d at 295, and "[i]f there is evidence to support two conflicting views, the Board's findings must be allowed to stand even though we might have reached a different conclusion on our own." Champ Corp., 933 F.2d at 691. While it is true that one of the Union supporters threw an

object at employees Canamar and/or Zdzairski as they were riding inside Canamar's van, (and not at the van itself, as found by the hearing officer), we note that 1) Zdzairski had already voted (and thus could not have had his vote affected by the incident) and 2) Lakewood failed to present any witnesses who had not yet voted, observed the stone-throwing, and were intimidated thereby. Therefore, we are not convinced based on the record before us that this incident interfered with the employees' exercise of free choice to such an extent that the results of the election were materially affected. See WFMT, 997 F.2d at 274. We hold the hearing officer's factual findings with respect to the size of rally, whether the driveway was

partially blocked, and the throwing incident meet the requisite standard of proof (Substantial evidence). 29 U.S.C. §160(e).

B.

We next address Jose Galvan's and Rico Cristo's use of cameras during the Carroll and Sacramento Street rallies and the Union's dubious explanations regarding the picture taking. Lakewood contends that the use of the cameras "created an atmosphere of surveillance, coercion, intimidation, and reprisal, all of which rendered free choice impossible." The employer notes that when interrogated at the scene while taking the actual pictures, the Union representatives failed to offer any explanation as to why they were taking

photographs. Secondly, Lakewood characterizes the Union's explanation of the accidental exposure of the Sacramento Street pictures as "wholly implausible."

Both the courts and the Board, through the application of logic and the experiences of life, have recognized the coercive and intimidating effect Union photography may have on employees during an election. See, e.g., Millard Processing Services, Inc. v. N.L.R.B., 2 F.3d 258 (8th Cir. 1993), cert. denied, 114 S.Ct. 922 (1994); Air Line Pilots Ass'n v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986); N.L.R.B. v. Associated Naval Architecture, Inc., 355 F.2d 788 (4th Cir. 1966); Nu-Skin International, Inc., 307 NLRB 223 (1992); Mike Yurosek & Sons, Inc., 292 NLRB 1074

(1989); and Pepsi Cola Bottling Co. of Los Angeles, 289 NLRB 736 (1988). In this factual scenario, the subjects of photography had no knowledge of why the Union was taking their pictures at that particular time. In the absence of a timely and plausible explanation for this intrusion with cameras, or perhaps even with an explanation, it is not unreasonable for a photographed voter to be intimidated and to be fearful and apprehensive of future Union retribution.

Cristo and Galvan testified some five weeks after the actual event that they were instructed by the Union to take photographs of Union supporters during the rallies for use in the Union newsletter. There is no such evidence in this record that Cristo and Galvan

offered any explanation for their actions to the subjects of their pictures contemporaneous with the taking of the pictures. The only pictures introduced into evidence depict Union supporters waving banners and placards, and it is true that some of these photographs appeared in the April 1992 Union newsletter. In spite of the fact that Galvan and Cristo gave no explanation to the subjects of their photographs contemporaneous with taking their pictures, the hearing officer stated that publication in the Union newsletter was a "valid explanation for taking the photographs" and concluded that "I do not believe that the use of the camera at the Sacramento and Carroll Street facility to take photographs of [Union] supporters

constitutes objectionable conduct." Citing its Decision and Order in Nu-Skin, the Board agreed with the hearing officer's conclusion that the photographs of employees voluntarily attending a Union rally were not objectionable. With regard to the photograph of the two employees observing the Union rally from a darkened tool room, the Board determined that "[that] single photo...was an isolated event that does not warrant setting aside the election." In Nu-Skin, upon which the Board relied, Union representatives took some eighty-eight photographs of employees attending the Union's picnic luncheon. Many of the photographs depicted employees posing for the camera and sometimes displaying Union T-shirts, and "were for the purpose of

memorializing the chicken meal and perhaps to publish in a union newspaper." 307 NLRB at 224. Although two employees testified that they were "concerned" and "felt funny" about having their picture taken, the Board affirmed the hearing officer's conclusion that "the photographs were innocuous and that the Union's taking of them did not reasonably tend to interfere with the employees' free and uncoerced choice in the election." Id. The Nu-Skin Board also noted that when asked why the pictures were being taken, the Union representative stated, "You all are going to make the front page of USA Today," and "we want you to remember this fun-filled memory." Id. at 224-25.

The Board in Nu-Skin found the circumstances in that case "entirely distinguishable" from the two cases Lakewood relies upon, Pepsi Cola and Mike Yurosek. The Nu-Skin Board noted that in Pepsi Cola, on the day before the election and while a union rally was in progress, a union representative appeared to videotape at least two employees as they exited the workplace and were handed union leaflets, and that "[n]o explanation for the videotaping was offered then or at the hearing." Nu-Skin, 307 NLRB at 224. The Board concluded that, in the absence of explanation from the union, the employees could reasonably believe that the union was contemplating future reprisals against them."

In Mike Yurosek, a union representative took photographs of pro-union and anti-union employees' campaign activities at the employer's entrance gate almost every day during an election campaign. The union representative told an anti-union activist that "We've got it on film; we know who you guys are... after the union wins the election some of you may not be here." Mike Yurosek, 292 NLRB at 1074. "Finding the photographing objectionable, the Board noted that no explanation of the photographing was provided to assuage the employees' fears and that the union representative's statement was arguably threatening. The Board also noted that no valid explanation of the photographing was offered at the hearing." Nu-Skin, 307 NLRB at 224. In the case at bar, the

hearing officer made credibility determinations which are somewhat questionable when considering the surrounding facts and circumstances but which we are bound to accept under our restrictive standard of review, even though we may have come to different conclusions if we had reviewed the record de novo. WFMT, 997 F.2d at 274; see also Tuf-Flex Glass, 715 F.2d at 295 (hearing officer's determinations of credibility and demeanor "may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its face incredible"). The hearing officer concluded that the subjects of the photographs were all Union supporters

attending a rally and the pictures were taken for the purpose of publication in the Union's newsletter. Allegedly the sole exception was the single photograph of the two employees in the darkened tool room. In Nu-Skin the Board rejected the employer's contention that the picture-taking intimidated the employees even though two of the employees testified that they were "concerned" and "felt funny" about being photographed. Here, the record reveals that Lakewood failed to produce any eyewitnesses to testify that he or she was concerned or made to feel uncomfortable by the Union's picture-taking. The two employees who were photographed in the tool room testified and neither stated that he felt threatened from the photography.

However, it is troubling that in this case the Union failed to offer an explanation for the photography at the time the pictures were being snapped. It was not until five weeks after the election--allowing the Union plenty of time to come up with a justification for its actions--that the Union stated that the photos were for publication in the Union newsletter. In Pepsi Cola and Mike Yurosek, the Board observed that the Union failed to offer a valid explanation of why it was taking photographs either at the time the pictures were taken or at the hearing afterward. Nevertheless, as we noted in NLRB v. Precise Castings, Inc., 915 F.2d 1160, 1164 (7th Cir. 1990), cert. denied, 499 U.S. 959 (1991), "[r]erunning elections, or litigating

about their validity, may frustrate indefinitely the implementation of the employees' legitimate selection. Choosing how much imperfection to accept is for the Board." Although we affirm the Board's conclusion that under the circumstances it would be inappropriate to set aside the election, we wish to make it clear that photography that intimidates, coerces, or influences voters in labor elections will not be tolerated.

Finally, Lakewood argues that it is "wholly implausible" that the pictures taken at the Sacramento Street rally were inadvertently destroyed. The hearing officer based his factual finding that the exposure of the film was accidental "base[d]... on my observation of the

demeanor of Galvan and Cristo while testifying and the fact that the [Union] had no hesitancy to introduce into evidence the [pictures available on that date] it took at the Carroll Street facility the evening of April 3 and the admission that Cristo was taking photographs at 601 N. Sacramento that morning." Although we believe there is some merit to Lakewood's implausibility characterization, we note that our restrictive standard of review bars us from reweighing credibility determinations. WFMT, 997 F.2d at 274.

CONCLUSION

The hearing officer's findings of fact with respect to the number of Union supporters at the Carroll Street facility

and the stone throwing incident, subsequently adopted by the Board, are supported by substantial evidence in the record considered as a whole. With regard to the partial blocking of the Sacramento Street driveway and the Union's photography, we conclude that the Board's determination that the Union did not engage in conduct sufficient to warrant a new election was proper. Therefore, the Board's Decision and Order requiring Lakewood to bargain with the Union is ENFORCED.

APPENDIX B

310 NLRB No. 200

DOR
D-4200

Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAKEWOOD ENGINEERING AND MFG., INC.

and

Case 13-CA-31381

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, LOCAL 743 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

DECISION AND ORDER

On January 19, 1993 the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 13-RC-18433. (Official notice is taken of the

"record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On March 17, 1993, the General Counsel filed a motion to transfer proceedings to the Board and Motion for Summary Judgment. On March 18, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain and to furnish information that is relevant and necessary to the Union's role as bargaining representative, but attacks the validity of the certification on the basis of its objections to conduct affecting the results of the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We

therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). There are no factual issues regarding the Union's request for information because the Respondent admitted that it refused to furnish the information.[1] Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

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[1] In its answer, the Respondent states that it is without knowledge whether the requested information is necessary for and relevant to the Union's performance of its duties. We note, however, that the wage and employment information sought by the Union is presumptively relevant and that the Respondent has not attempted to rebut the relevance of that information. See *Central National Gottesman, Inc.*, 305 NLRB No. 97 (Nov. 26, 1991).

Findings of Fact

I. Jurisdiction

The Respondent, an Illinois corporation, with an office and places of business in Chicago, Illinois, has been engaged in the manufacturing of portable electric fans, heaters, and chair swivels. During the calendar year ending December 31, 1992, a representative period, the Respondent, in conducting its business operations, sold and shipped from its Chicago, Illinois facilities products, goods, and materials valued in excess of $50,000 directly to points outside the State of Illinois. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization

within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Certification*

Following the election held April 3, 1992, the Union was certified on November 4, 1992, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time production, maintenance, tool room and warehouse employees employed at the Employer's facilities now located at 1901-45 W. Carroll Street, 1756 W. Lake Street, 501 N. Sacramento Street, 212 N. Carpenter Street, and 315 N. Racine, Chicago, Illinois; excluded are all other employees including quality assurance, product engineering, manufacturing engineering, customer service, sales, office expeditor, security, office and office clerical employees, temporary employees, supervisors and assistant supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since on or about November 9 and December 9, 1992, the Union has requested the Respondent to bargain and to furnish information which is necessary for and relevant to its duty as collective-bargaining representative. At all times since about November 9, 1992, the Respondent has refused these requests. We find that these refusals constitute an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusion of Law

By refusing on and after November 9, 1992, to bargain with the Union as the exclusive collective-bargaining

representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided

by law, we shall construe the initial period of the ccrtification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Lakewood Engineering and Mfg., Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, a/w International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time production, maintenance, tool room and warehouse employees employed at the Employer's facilities now located at 1901-45 W. Carroll Street, 1756 W. Lake Street, 501 N. Sacramento Street, 212 N. Carpenter Street, and 315 N. Racine, Chicago, Illinois; excluded are all other employees including quality assurance, product engineering, manufacturing engineering, customer service, sales, office expeditor, security, office and office clerical employees, temporary employees, supervisors and assistant supervisors as defined in the Act.

(b) On request, furnish the Union information that is relevant and

necessary to its role as the exclusive representative of the unit employees.

(c) Post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 13 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. April 23, 1993

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, a/w International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you

in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time production, maintenance, tool room and warehouse employees employed at our facilities now located at 1901-45 W. Carroll Street, 1756 W. Lake Street, 501 N. Sacramento Street, 212 N. Carpenter Street, and 315 N. Racine, Chicago, Illinois; excluded are all other employees including quality assurance, product engineering, manufacturing engineering, customer service, sales, office expeditor, security, office and office clerical employees, temporary employees, supervisors and assistant supervisors as defined in the Act.

WE WILL, on request, furnish the Union information that is relevant and

necessary to its role as the exclusive representative of the unit employees.

LAKEWOOD ENGINEERING AND MFG., INC.
(Employer)

Dated _____ By
(Representative (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 200 West Adams Street, Suite 800, Chicago, Illinois 60606-5208, Telephone 312-353-7589.

APPENDIX C

NOT INCLUDED IN BOUND VOLUMES

DOR
Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAKEWOOD ENGINEERING AND MFG., INC.

Employer

and

Case 13--RC--18433

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, LOCAL 743, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 3, 1992, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 312 for and 197 against

the Petitioner, with 37 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1]

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[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Stretch-Tex Co., 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

The Employer also excepted to the hearing officer's report and recommendations, contending that it evidences bias. Upon our full consideration of the entire record in these proceedings, we find no evidence that the hearing officer prejudged the case, made prejudicial rulings, or demonstrated bias against the Employer in his analysis and discussion of the evidence.

In adopting the hearing officer's finding that the Petitioner's taking of photographs did not constitute

(continued...)

and recommendations,[2] and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, a/w International Brotherhood of Teamsters, AFL-CIO, and that it is the

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[1](...continued)
objectionable conduct, we note that the hearing officer credited the Petitioner's explanation that its purpose in taking the photographs was a noncoercive one. Accordingly, we find that here the photos taken of employees voluntarily attending a Union rally are not objectionable, see Nu Skin International, Inc., 307 NLRB No. 46 (April 22, 1992), and that the single photo taken of two employees observing the rally from the darkened toolroom was an isolated event that does not warrant setting aside the election.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule Objection 5(a).

exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time production, maintenance, tool room and warehouse employees employed at the Employer's facilities now located at 1901-45 W. Carroll Street, 1756 W. Lake St., 501 N. Sacramento St., 212 N. Carpenter St. and 315 N. Racine, Chicago, Illinois; excluded are all other employees including quality assurance, product engineering, manufacturing engineering, customer service, sales, office expediter, security, office and office clerical employees, temporary employees, supervisors and assistant supervisors as defined in the Act.

Dated, Washington, D. C. November 4, 1992.

_____

Dennis M. Devaney, Member

_____

Clifford R. Oviatt, Jr., Member

_____

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THIRTEEN

LAKEWOOD ENGINEERING AND MFG. CO.

Employer

and Case 13-RC-18433
Stipulation

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION; LOCAL 743, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

Richard B. Lapp, Attorney, for the Employer

Susan Brannigan, Attorney, for the Petitioner

Richard S. Andrews, Attorney, Regional Director's Representative, Region 13

BEFORE: R.J. Symkowiak, Hearing Officer

HEARING OFFICER'S REPORT
AND
RECOMMENDATIONS ON OBJECTIONS

Pursuant to a petition filed on February 4, 1992 (all dates 1992 unless otherwise indicated), and a Stipulated

Election Agreement approved on February 27, an election by secret ballot was conducted on April 3 under the direction and supervision of the Regional Director for Region 13 of the National Relations Board in the following unit of employees:

> All full-time production, maintenance, tool room and warehouse employees employed at the Employer's facilities now located at 1901-45 W. Carroll Street, 1756 W. Lake St., 501 N. Sacramento St., 212 N. Carpenter St. and 315 N. Racine, Chicago, Illinois; excluded are all other employees including quality assurance, product engineering, manufacturing engineering, customer service, sales, office expediter, security, office and office clerical employees, temporary employees, supervisors and assistant supervisors as defined in the Act.

The results of the election were as follows:

Approximate number of eligible voters	540
Void ballots	5
Votes cast for petitioner	312
Votes cast against participating labor organization	197
Valid votes counted	509
Challenged ballots	37
Valid votes counted plus challenged ballots	546

Challenged ballots are not sufficient in number to affect the results of the election.

On April 10, the Employer filed timely Objections to Conduct Affecting the Results of the Election, copies thereof being duly served upon the Petitioner.

As a result of the filing of Objections, an investigation was conducted. On April 28, the Acting Regional Director issued and served on the parties her Report on Objections and Notice of Hearing. Pursuant to said Order, on May 14, 19, 20, 22, 27, 28,

June 1 and 2, a hearing was conducted before the undersigned in Chicago, Illinois, at which time Counsel for the Employer, Counsel for the Petitioner, and Regional Director's Representative appeared and presented evidence. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to produce relevant evidence bearing upon the issues in this case and to submit legal memoranda.[1] The evidence and arguments raised by the parties have been thoroughly considered. The findings of fact and credibility resolutions contained herein are based on my consideration of the entire record and

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[1] Counsel for the Employer and Counsel for the Petitioner filed legal memoranda and the Regional Director's Representative did not.

upon my observations of the testimony and demeanor of the witnesses.[2]

The Election

The election was conducted on April 3 at four separate locations: 501 North Sacramento from 6:30 a.m. to 8:00 a.m. and 3:00 p.m. to 5:00 p.m.; 212 North Carpenter from 3:00 p.m. to 5:00 p.m.; 1756 West Lake Street from 3:00 p.m. to 5:00 p.m.; and 1901-45 West Carroll Street from 6:30 a.m. to 7:30 a.m. and 10:30 p.m. to 11:30 p.m.

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[2] Accordingly, any failure to detail all conflicts in evidence does not mean that such conflicting evidence was not considered. Bishop and Malco, Inc., d/b/a/ Walkers, 159 NLRB 1159 (1966).

Objection (a)[3]

There was no evidence proffered during the hearing about any "deliberately staged scene involving a supervisor" on April 2 as alleged in this Objection. Furthermore, there was no argument raised in the Employer's memorandum of law in support of this Objection. Since the Employer has failed to present any evidence in support of this Objection, I shall recommend it be overruled.

Objection (b)

This Objection alleges that before the election an employee was told to vote for the Petitioner and that if she did not she would be physically harmed. This

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[3] The Employer's Objections are numbered 5(a) through (h). I shall refer to them by letters (a) through (h).

Objection involves an event that took place a few minutes before the 7:00 a.m. shift start in the women's washroom-locker room on April 3 at the 501 North Sacramento facility. This event involved employees Martha Gutierrez and Blandina Cardenas.

Gutierrez testified that she arrived at work at 6:50 a.m. to 6:53 a.m. on April 3 and went directly to the washroom where her locker is located and while she was washing her glasses Blandina Cardenas came up to her and nudged her shoulder and told Gutierrez if she voted "no" Cardenas would cut her head off.

Blandina Cardenas testified that she said to Gutierrez, "let's go vote, vote yes, don't vote no, if not I'll give you

a knock on the head."[4] Cardenas testified further that she then tapped Gutierrez on the shoulder as she was leaving, said don't believe it, laughed and left the washroom.

The Employer contends that this event amounted to a death threat which was related to other employees on election day and warrants setting the election aside.

The Petitioner considers the remark to be an isolated and innocuous remark

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[4] The witness testified in Spanish through an interpreter (TR 610). Initially there was some confusion on the interpreter's part as to the translation of the Spanish word "coscorron" which is the Spanish word used by the witness in describing the event. The interpreter initially translated the word as a slap but later checked a Spanish-English dictionary and reported that "coscorron" translates to "knock in the head" (TR 627). The parties agreed that "knock on the head" is the correct definition of "coscorron." I have accepted this as the definition.

tempered by a laughing disavowal which is not sufficient to warrant overturning the election.

The first issue to be dealt with is which version of the incident is to be credited. Gutierrez' testimony was characterized by generalizations and observations which appeared to be made for effect. She spoke of the people in the washroom that morning as "they" and "the people" and that "they were always saying...that we were chicken," without being able to identify these people or be more specific as to what was said. On cross-examination she testified that she did not know how many were in the washroom that morning or who any of the people were.

Blandina Cardenas, however, was forthright and self assured on the stand

and her testimony demonstrated a genuine attempt to accurately recall past events. Her testimony on this matter and others, both on direct and cross-examination, revealed precise answers to questions put to her without any tone of bias or expression of animosity as was demonstrated by the testimony of Martha Gutierrez.

Based on my observation of the witnesses, I credit the testimony of Blandina Cardenas and I do not credit Martha Gutierrez. I do not believe that Cardenas said she would cut Gutierrez' head off. I believe Cardenas' version on all points. I, therefore, conclude that Cardenas nudged Gutierrez on the shoulder and told her to vote yes or she would give her a knock on the head, then as a signal that she was joking, Cardenas

tapped Gutierrez on the shoulder, laughed and said not to believe it.

The next issue is whether the statement made in the credited testimony of Cardenas constitutes objectionable conduct. Cardenas testified that she was not on the Petitioner's organizing committee, did not distribute authorization cards or serve as the Petitioner's observer during any of the polling periods. She testified that she attended four of the Petitioner's meetings held before the election.[5] There was no evidence presented during the hearing to establish that the Petitioner instigated, directed, authorized, ratified, condoned or adopted

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[5] Petitioner representative Padilla testified that a total of nine general meetings were held for employees of the Employer.

the conduct of Cardenas. Six Flags Over Mid-America Inc., 253 NLRB 111 (1980). Based on these factors, it must be concluded that Cardenas conduct was not attributable to the Petitioner.

The test to be applied, therefore, is that applied to third party conduct or conduct unattributable to either party. That is, whether the conduct was so aggravated as to create an atmosphere of fear and reprisal rendering a free election impossible. Westwood Horizons Hotel, 270 NLRB 802 (1984). There was no other allegation any other employees were approached by pro-Petitioner employees and urged to vote for the Petitioner under threat of physical harm. In view of this fact and based on my finding that Cardenas' version of the April 3 event is to be credited, I recommend that the

Board overrule this Objection as I do not believe that Cardenas' statement created a general atmosphere of fear and reprisal rendering a free election impossible.

The Board has also considered the closeness of the vote in evaluating such third party conduct. Buedel Food Products Co., 300 NLRB No. 70 (1990); RJR Archer, Inc., 274 NLRB 335 (1985); YKK (U.S.A.) Inc., 269 NLRB 82 (1984). The Petitioner here won the election by 114 votes. I would, therefore, conclude that Cardenas' statement, as credited, made at one of the Employer's five facilities on the day of the election could not have impacted to such an extent as to result in a different election outcome.

Based on all of the foregoing, I shall recommend Objection (b) be overruled.

Objection (d)[6]

In this Objection, the Employer alleges that employees were threatened by supervisors and others that if they did not vote for the Petitioner, they would lose their jobs.

Employer Counsel, in his memorandum of law, has focused this Objection on the involvement of supervisor Humberto Cardenas, who allegedly distributed authorization cards at work and actively campaigned for the Union, and Elias Diaz and Javier Zamora, who allegedly supported the Petitioner.

Human Resources Director Brueck testified that after the election the Employer acquired evidence that supervisors Humberto Cardenas, Javier

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[6] Objection (c) is addressed together with Objection (h) below.

Zamora and Elias Diaz were involved in the Petitioner's campaign. Brueck also testified that he had no first hand knowledge, only what employees had told him.

Employee Manuela Collazo, who works at 501 Sacramento, testified she saw Humberto Cardenas give a Petitioner authorization card to an employee in the Painting Department when she (Collazo) was on her way to lunch. She did not recall the exact date but it was before a two week layoff. She could not tell whether the person who allegedly received this card was a man or a woman and did not see the person's face.

Collazo's testimony was vague and inconsistent as to dates and other matters. She initially testified that she did not see or hear anything

regarding an anti-Petitioner petition circulated at work allegedly by her husband and then later testified that she had been questioned about it by Petitioner organizing committee members. On cross-examination, she was reluctant to answer certain questions and had to be directed to answer by the undersigned.

Collazo also testified contrary to her affidavit given during the prehearing investigation of these Objections. Collazo testified at the hearing that she considered out of the ordinary the fact that Petitioner supporters were at the Employer's facility the day of the election, waiving flags and telling people to vote for the Petitioner as she arrived at work. She stated she considered this out of the ordinary because the Employer had told employees

the Petitioner should not be doing anything.

In her Board affidavit Collazo testified that she saw nothing out of the ordinary on the day of the election. When confronted with this inconsistency Collazo initially attempted to explain it by stating that maybe someone made a mistake when she said that she did see something out of the ordinary. She later attempted to explain the inconsistency by testifying that the statement in the affidavit referred only to inside the Employer's facility.

I cannot credit the testimony of Manuela Collazo. Her vague answers, inconsistent replies and the conflict in her testimony at the hearing and in her affidavit standing alone should be sufficient to discredit her. However,

this credibility resolution is further enhanced by Collazo's performance on the stand. At times she resisted answering questions on cross-examination and at other times volunteered testimony. Based on my observation of her demeanor, Collazo is not to be credited on this matter.

Michelle Grant testified that Ismelda Chacone told her that supervisor Elias Diaz had said the Petitioner would be good for the people. Chacone testified that she did not tell Grant that Diaz said the Petitioner would be good for employees. Chacone recalls Grant asking about the Petitioner and told her she should go to one of the Petitioner's meetings.

When confronted with her Board affidavit given during the pre-hearing

investigation, Grant testified that Diaz told her that the Petitioner was "no good." Although Grant's testimony and her affidavit do not conflict, her testimony is that Diaz told her that Petitioner is "no good," but the hearsay from Chacone is that Diaz said the Petitioner is "good" for the people. Based on this conflict, which was not resolved by her testimony, I do not credit Grant's testimony on this Objection.

Martha Gutierrez testified that she heard two employees, Chone and Mary Lou (she did not know or give their last names) say that two supervisors told employees to vote for the Union. Gutierrez said the supervisors were Javier Samora and Roberto Cardenas (I believe the correct spelling of these

names is Javier Zamora and Humberto Cardenas). This testimony is anything but definitive. This is hardly evidence which establishes that the election should be set aside. In any event, as noted in Objection (b), I do not credit the testimony of Martha Gutierrez there and for the same reasons I do not credit her testimony in this Objection.

Finally there is the testimony of Jose Calderon. Calderon was called to testify under subpoena by the Employer and testified only after the undersigned directed the Regional Director's Representative to proceed with enforcement of the subpoena. Calderon testified he saw Humberto Cardenas sitting in his van outside the building where the Petitioner held meetings on two occasions. Employee Blandina Cardenas

testified that her husband Humberto Cardenas drove her to three meetings the Petitioner held and waited in the van for her during the meetings.

There was no evidence to establish that Humberto Cardenas spoke to employees entering these meetings or that he attended the meetings. All Cardenas did was drive his wife to the meetings then waited for her. Such conduct does not establish that he actively supported the Petitioner's campaign.

Based on the foregoing credibility resolutions and findings of fact, I find that there is no credible evidence that any supervisor of the Employer engaged in conduct supportive of the Petitioner or that employees were threatened by supervisors to vote for the Petitioner or they would lose their jobs. Therefore, I

shall recommend Objection (d) be overruled.

Objection (e)

This Objection alleges that Petitioner supporters massed outside the polling places at the Employer's 1901-45 W. Carroll and 501 N. Sacramento facilities during the polling periods of those locations on April 3 observing, threatening and otherwise coercing employees.

Carroll Street

With respect to the Carroll Street location, witnesses testified that during the evening polling period from 10:30 p.m. to 11:30 p.m. a group of people were across the street from the entrance to that facility. That entrance is adjacent to the polling place which has an outside

wall on Carroll Street (Employer Exhibit 2).

The polling place was in the plant lunchroom adjacent to the Carroll Street door to the plant. It has windows on the Carroll Street wall, however, these were partially covered during the election so that no one could see in or out.

Human Resources Director Robert Brueck testified he arrived at the Carroll Street facility at 9:45 p.m. and saw six to ten cars parked across the street with approximately twenty people present. Brueck testified that he went to the shipping dock during the polling period three times to observe the group and that each time it had increased in size, to a total of 40 to 50 people. He testified they were waving banners, yelling and someone was using a

megaphone. He stated people were saying "Vote Teamsters, Vote si" and playing loud music. Brueck testified that he observed Petitioner representatives Alicia Padilla and Jose Galvan among those in the group and Galvan was taking pictures of them. Brueck also testified that a van with the Petitioner's name on it arrived between one of his trips to the shipping dock. Brueck observed a car stop and a person got out and entered the polling place. The group continued waving banners yelling "Vote Teamsters, Vote si" and talking among themselves. Brueck testified that employee parking is behind the plant with some parking near the southwest end of the plant, and that employees enter from behind the building (Employer Exhibit 2). Brueck also testified that employees got to the

parking area behind the plant by way of an alley which runs behind the plant.

Plant Production Manager Boyd Kyle testified that he arrived at 9:45 p.m. and observed four to six cars parked and approximately 10 to 20 people across the street from the plant entrance. Kyle testified that during the preelection conference he went to the plant entrance and the group increased in size, played loud music, and were talking and chanting. During the polling session between 10:30 p.m. and 11:30 p.m. Kyle testified that he observed the group and it increased to about 50 people. He stated he observed Jose Galvan taking pictures. He testified he could hear someone speak through a bullhorn and then hear a response. Kyle stated he could not make out what the chanting was or

what was said over the bullhorn. Kyle testified that one car pulled up and someone got out and went into the plant and that the crowd got louder at this time. Kyle said that approximately 15 to 16 employees work each of the shifts at Carroll Street.

Gloria Becerra, the Employer's observer at the Carroll Street evening polling session, testified that she arrived at about 9:15 p.m. and did not observe anyone outside the plant except for the guard. Becerra testified that while she was in the polling place prior to the start of the election she heard cars driving fast and could hear people with a speaker saying "Teamsters, Teamsters, Vote Teamsters." Becerra testified that during the actual polling period she heard noise and music off and

on, but could not distinguish what was being said.

Latonea Harrera, a maintenance employee at the Employer's Carroll Street location, testified that he was present at the Carroll Street plant between 10:00 p.m. and 10:30 p.m. the evening of the election. Harrera stated that he was in the tool room, which is next to the polling place with windows on the Carroll Street wall. He testified that he observed Jose Galvan and 15 to 20 people with bumper stickers and Mexican flags. He said they were drinking and playing music. Harrera testified he heard people yelling out "union" and "up with Teamsters." He testified further that he saw Galvan taking pictures of the group and that Galvan took one picture of those

people inside the tool room where Harrera was located.

Much of the foregoing is not in dispute. The Petitioner witnesses admit being present at the Carroll Street location across from the plant entrance from about 9:45 p.m. through the polling period. Jose Galvan admits he took pictures of the group present. (Those pictures are contained in Union Exhibits 2 and 3.) Galvan and other Petitioner witnesses, including Jose Amparo Rosales, also testified that Rosales had a megaphone which he used to ask the group how they voted and the group responded "Teamsters." Petitioner witnesses also testified that music was played on a car radio.

It is also undisputed that one vehicle drove up to the front entrance of

the Carroll Street facility and let off a passenger who entered and then came back out and got in the vehicle, which then left.

The driver of this vehicle, John Canamar, testified that he drove to the Carroll Street facility about 10:15 p.m. the evening of April 3 with an individual who had been unable to vote earlier at the Sacramento facility. Canamar testified he observed a group of 20 or more across the street. This group included Jose Galvan, Jose Amparo Rosales, Ismelda Chacon. Canamar testified that Rosales had a megaphone or bullhorn and said that Canamar had sold out to the Employer and that he was a parabolic antenna. Canamar also said several women urged him to get out of the van and Miguel Rocha said he was not

going to put a Petitioner flag on the van Canamar was driving "...because that was only for men." Canamar testified that a security guard told him he could not remain parked in front of the entrance to the Carroll Street facility, so he moved the van across the street. He testified that at this time Galvan spoke to the group which then started to slowly move in the direction of where the van was. At about this time the person he had brought to Carroll Street came out and got in the van and Canamar drove away. As he did so he testified that someone threw a small object, rock or piece of metal, that hit one of the windows in the van. Canamar testified that he returned to the Sacramento facility about 10:45 p.m. and that the trip takes about five to seven minutes.

Stanislaw Zdzairski testified that he was driven to the Carroll Street facility about 9:10 p.m. in a van. When he arrived he testified that he saw a group of about 25, 30 or more people standing across the street screaming loudly. Although he testified he could not understand what was said as he does not speak the language he did hear the word "union." Zdzairski testified he got out of the van at the front door where a security guard was standing and he went into the building. He also stated that as he was entering at about 9:30 p.m. some people were on the street yelling and whistling and "...throwing at us some different objects, stones..." (TR 238). Zdzairski testified that as he left he could hear "...the noise of them throwing things at me and that he ran to the van"

(TR 240-1). He also said that when he was in the van he heard some small but heavy object hit the van window. Zdzairski then testified that no one had thrown anything at him when he first got out of the van and entered the building.

Ryszad Stanislawski testified that he was at the Carroll Street facility April 3 from about 10:30 p.m. until after the election. During this time he was periodically in the tool room, which is next to the polling place. He stated he observed people screaming, holding boards and flags. He also testified that he observed Jose Galvan taking pictures, and once while he and Harrera were looking out the window Galvan turned quickly and took a picture of them inside the tool room. Stanislawski testified that the

lights were not on when he was in the tool room.

Jose Galvan testified that there were about 15 to 20 people across the street from the front entrance to the Carroll Street facility during the polling period, and that he took pictures of the group.

Jose Amparo Rosales testified that he was present at the Carroll Street location across the street from the facility with approximately 10 to 15 people. He stated that he had a megaphone which he got from Alicia Padilla and that he would ask the group how they were going to vote and they would respond by saying "Teamsters." Rosales testified that he saw Canamar drive to the Carroll Street facility and park near the facility until he was told

to move by the security guard. Rosales testified that he spoke to Canamar through the megaphone and said Canamar had sold out and to be careful with the parabolic antenna.

Alicia Padilla testified that she arrived at the Carroll Street facility about 9:45 p.m. and parked across the street from the entrance. She stated that she attended the pre-election conference at 10:00 p.m. then returned to the area across the street from the facility where a group of approximately 20 people were located. The group was talking and playing music and occasionally someone would ask how did they vote and people would say yes in response. She testified that she did not see any stones or other objects thrown nor did she see anyone drinking. Padilla

stated that she told the group not to make too much noise. She stated that a police patrol car came by about 11:00 p.m. and said that somebody had called and reported a riot. Padilla testified that she told the police it was not a riot but a rally and that an election was being held and votes were to be counted at 11:30 p.m. The police then left according to Padilla. She stated she observed a van stop for about five minutes screeching its brakes a couple of times as it backed and went forward. She did not see anyone get out of or into the van.

Olga Menchaca, Petitioner observer at Carroll Street, testified that during the polling period she heard talk and laughter coming from outside the building. She denies hearing music or

anyone using a megaphone or bullhorn. Menchaca testified that she could hear voters inside the polling area very well and that she could not see out because the windows were covered. She also testified that about 16 or 17 employees work the third shift and the same amount work second shift.

I believe the size of the group at Carroll Street to be approximately twenty. Harrera, Canamar, Stanislawski and Padilla all testified that the size of the group was about fifteen to twenty. The photographs of the group show somewhere between fifteen and twenty, and while it is certainly possible that some individuals were not in the photograph, I do not believe there were as many as fifty as Brueck and Kyle testified. Therefore, I do not credit Brueck's and

Kyle's testimony on the size of the group at the Carroll Street location.

It is clear from the foregoing that a group of people including Petitioner agents Padilla and Galvan were across Carroll Street from the polling place during the evening session there. It is also clear that some of the group's commotion could be heard inside, however, neither of the witnesses who were inside the polling place during the polling period testified they could hear with any specificity what was said or that it interfered with conversation inside the polling place. Menchaca testified that she could hear sounds if she paid attention but could not identify them. Beccara testified she only heard noise and music off and on during the polling period. I find both witnesses testimony

on this point to be consistent and credible.

I also credit Canamar and Zdzairski's testimony that a small object was thrown at the van as Canamar drove away from the Carroll Street facility. However, I do not credit Zdzairski's testimony that anything was thrown at him as he entered the facility or when he returned to the van. His testimony was inconsistent on this point and by his demeanor on the stand he appeared to be enhancing the facts. Furthermore, there was no other testimony to support his assertion that anything was thrown at him.

Sacramento Boulevard

The Employer's Sacramento facility has a driveway on the north side of the building leading to an employee parking

area. A sidewalk and service drive are located on the west side of the building with a median between the service drive and Sacramento Boulevard. The northwest corner of the building is designated and has been referred to as 601 N. Sacramento during the hearing. The polling area at Sacramento was located near the northwest corner of the building approximately 50 feet from the driveway on the north side of the building (see Employer Exhibit 1). Brueck's office and a hallway separate the polling place from the driveway and the polling place has no outside windows, according to undisputed testimony.

Brueck testified that about 5:30 a.m. he was in his office when he heard a commotion outside and he looked out the window and observed people assembling and placing Petitioner pennants in the area.

Brueck testified that he looked out again about 6:00 a.m., and saw that the crowd was larger. He also stated people were driving in to work and were slowing or stopping as they entered the driveway to receive pennants. At about this time Brueck observed Padilla, Galvan and an individual with a camera apparently taking pictures of the group gathered there. He stated that he could hear the group in his office bantering and saying "Vote Teamsters" and speaking in Spanish and that there were twenty to twenty-five people present.

Beccera testified that she arrived at the Sacramento facility at approximately 6:30 a.m. and she observed about twenty people at the driveway entrance to the parking lot passing out Petitioner banners to cars as they

entered. She also testified that they did not stand in front of cars entering.

Sylvia Garcia testified that she was in the area of Brueck's office from 3:00 p.m. to 5:00 p.m. during the afternoon polling session at Sacramento. About 3:25 p.m. she heard noises and looked out the office window and saw employees and Petitioner representative Alicia Padilla standing on the side of the driveway. The group was initially six to eight, but grew quickly to twelve to fifteen. Garcia testified that the group was waving Petitioner banners and yelling. She also observed someone taking pictures and one car being blocked as it attempted to enter the driveway.

Maria Frias arrived at the Sacramento facility about 6:40 a.m., dropped off some riders, and drove to the

driveway leading to the parking lot. She testified that she saw six or seven people with posters shouting. She stated that Alicia' Padilla was present, and shouting into a microphone but did not know what was said. She testified that others said she should vote for the Petitioner or she would get "screwed." Frias testified she was asked if she wanted a banner as she entered, but her vehicle's progress was not blocked. She stated that members of the group tapped on her car windows as she entered, but she continued to the parking lot.

Michelle Grant testified she arrived at the Sacramento facility at about 5:30 a.m. at the 601 N. Sacramento location and saw five or six people at the driveway with signs saying "Teamsters." She also testified that when she left

work that day at 4:00 p.m. she observed six or seven people at the driveway at 601 N. Sacramento who were waving pennants and saying to vote for the Petitioner. Grant also testified she was given two Petitioner pennants through her car window as she left.

Jose Galvan testified that he was at the 601 N. Sacramento location about 5:20 a.m. for a period of 15 minutes. During that time about four or five people joined him. He testified he then went to the Carroll Street facility to open the polls, and returned to 601 N. Sacramento at about 6:50 a.m. He said he stayed for a period of 10 minutes with about four or five other people on the north side of the driveway near the service drive.

Later that afternoon Galvan testified he returned to the 601 N.

Sacramento location, where six or seven laid off employees and Petitioner agent Rico Cristo were present on the north side of the driveway to the parking lot. Galvan was present 20 to 25 minutes. Galvan denied being at 601 N. Sacramento at 6:40 a.m. or at 3:25 p.m.

Galvan also testified that Cristo had a camera and took pictures of the people at 601 N. Sacramento. He stated that Cristo later gave him the camera and that he mistakenly opened it and exposed the film.

Rico Cristo testified that he arrived at the 601 N. Sacramento location about 5:45 a.m. to 5:50 a.m., where about nine people were located. Cristo parked near the mustard factory which is located north of the driveway. Cristo handed out pennants to the group (Petitioner Exhibit

8) and took pictures of them. He stated there was a lot of laughing by the group. Cristo testified that he did not take pictures of employees or their cars as they were entering work. He testified that none of the group stood in the driveway or impeded traffic in any way. Cristo testified that he and Alicia Padilla went to the pre-election conference, and then left the Sacramento facility to go to his office where he gave the camera to Galvan. Cristo had taken eight pictures out of a roll of twenty-four. Cristo stated he returned for the opening of the polls at Sacramento that afternoon and did not have the camera with him.

Jose Amparo Rosales testified that before he went to work at 7:00 a.m. at the Carpenter Street facility, he went to

the 601 N. Sacramento location about 5:35 a.m. and parked near the mustard factory. Rosales said he was there about 30 minutes with about ten or eleven others. During this time he saw two or three cars enter the driveway.

Rosales also testified that he left the 601 N. Sacramento location to go to the 501 N. Sacramento entrance with Jose Gonzalez and Ricio Rodriguez for about 20 minutes. While at 501 N. Sacramento he spoke with other employees of the Employer. He then left and went to work. After he got off work at 3:30 p.m. that day he returned to 501 N. Sacramento with Rocio Rodriguez and Jose (he did not remember the last name) for about one hour. He testified that he had his Petitioner banners and that eight or nine others were present including Alicia

Padilla. He stated that some of those present were also employees from the Employer's Carpenter Street facility.

Margarita Chavez was the Petitioner observer at the Sacramento facility with Sofia Rios for both polling sessions on April 3. She testified she arrived about 5:45 a.m. and entered the polling place about 6:00 a.m. with Petitioner representatives. Chavez testified that during the morning polling period she did not hear anything from outside, nor was she aware of anyone being outside the plant. She stated she had no trouble hearing voters give their names in the polling place.

Sofia Rios testified that she arrived at 5:45 a.m. at the 601 N. Sacramento location and about six people were present at the north side of the

driveway. During the polling period she could not hear anything from outside the building on the street and had no difficulty hearing voters in the polling place.

Ismelda Chacon testified she was at 501 N. Sacramento with other employees including Jose Amparo Rosales where she was waving banners between about 6:10 a.m. and 6:40 a.m. She stated Alicia Padilla and Jose Galvan were also present.

Rocio Rodriguez an employee at the Carpenter Street facility testified that she and other Carpenters employees went to 601 N. Sacramento about 5:45 a.m. and 3:45 p.m. and stayed for about one hour both times. She stated that she and others, including Jose Amparo Rosales and Sofia Rios, stood on the north side of

the driveway at 601 N. Sacramento. She testified that she went to Sacramento in the afternoon to wait for her co-workers that work on the evening shift "...to say hello, for them to see me that I was there with flags and banners" (TR 646).

Alicia Padilla testified she arrived at the 601 N. Sacramento facility at about 5:45 a.m. on April 3 and parked by the mustard factory. She stated there were about eight to ten employees and committee people present on the north side of the driveway leading to the employee parking lot. Padilla testified the people had Petitioner banners and were urging people to vote for the Petitioner. Padilla went in to open the polls and after the polls opened she got in her car and left. She testified that when she left there were three people

waiting in their cars at the mustard plant area where she parked. Those people were waiting for Padilla, as they were going to return with her to the Petitioner's office. Padilla stated that she may have seen about three cars enter the driveway between 5:45 a.m. and 6:00 a.m., and the driveway was not blocked in any way. She testified that they were there to encourage employees to vote for the Petitioner. She also testified that she told those present not to block the driveway.

Clearly there is no dispute that the Petitioner had its representatives and supporters present at the Sacramento facility on April 3, both at the 601 and 501 N. Sacramento entrances. It is also undisputed that these people were waving Petitioner banners and urging employees

to vote for the Petitioner. Only one witness, Sylvia Garcia, testified that the driveway was ever blocked. In view of the overwhelming testimony of all other witnesses I do not credit Garcia's testimony that the driveway was blocked by the Petitioner supporters. I believe it is also clear that the group of supporters numbered from eight to twelve as the estimates of all witnesses range from six to fifteen at most.

It is equally clear that Rico Cristo took photographs of the supporters. There was no evidence that Cristo took photographs of employees entering the driveway or anyone other than the Petitioner supporters. I credit the Petitioner witnesses' testimony that the roll of film with the Sacramento facility photographs was inadvertently exposed and

destroyed. I base this finding on my observation of the demeanor of Galvan and Cristo while testifying and the fact that the Petitioner had no hesitancy to introduce into evidence the photographs it took at the Carroll Street facility the evening of April 3 and the admission that Cristo was taking photographs at 601 N. Sacramento that morning.

Testimony of Chavez and Rios reflects that during the polling period they did not hear anything from the group outside the polling place. This testimony is not refuted and is to be credited.

Employer Position

The Employer contends that the activities by the Petitioner and its supporters constituted "...picket line-type mob scenes..." which created an

atmosphere which precluded employee free choice. The Employer argues that 50 people at the Carroll Street facility, with a megaphone, threatened employees to vote for the Petitioner and also took pictures during the polling session including two employees in the polling place. It is also argued that the atmosphere was so threatening that Zdzairski was forced to run to and from the polling place when he was dropped off by Canamar.

The Employer argues that at the Sacramento facility the Petitioner and its supporters harassed people as they entered, shouted at them, beat on their cars and created an intimidating atmosphere. The Employer also contends that the presence of a camera added to the atmosphere of surveillance and

intimidation, and this conduct destroyed the atmosphere necessary for the exercise of free choice in a representation election.

Petitioner Position

The Petitioner contends that the gatherings at the Carroll Street and Sacramento Boulevard facilities were to appeal to employees to vote and that there were no impermissible campaign speeches or electioneering. It is also argued that the camera was used only to take pictures of the supporters and that there was no evidence that any eligible voter, other than supporters, entering either facility saw the camera. The Petitioner states that the rallies and picture taking were not coercive in nature and could not be considered to have a substantial effect on the

election, which the Petitioner won by a large margin.

The Board has held that union representatives' photographing and videotaping of employees constituted objectionable conduct. Mike Yurosek & Son, Inc., 292 NLRB 1074 (1989); Pepsi-Cola Bottling Co. of Los Angeles, 289 NLRB 736 (1988). In those cases the Board noted that no valid explanation was given by the unions involved why they were taking pictures of employees. In Yurosek the Board found that the union agent had threatened an anti-union activist that "We've got it on film; we know who you guys are...after the Union wins the election some of you may not be here."

In this case there is only one instance where pictures were taken of any

employees and that is at Carroll Street. While Galvan was taking photographs of the group he turned quickly to take a photograph of two employees looking out at the group from the unlit tool room.

The Petitioner witnesses were called and testified that photographs were taken and why. The Petitioner put into evidence the photographs taken at Carroll Street and in my opinion would have introduced those taken at Sacramento Boulevard had they not been destroyed. The Petitioner also provided what I believe to be a valid explanation for taking the photographs to include them in its publication, The Voice, which it also put into evidence.

Based on the foregoing I do not believe that the use of the camera at the Sacramento and Carroll Street facility to

take photographs of Petitioner supporters constitutes objectionable conduct. cf. Mike Yurosek & Son, Inc., supra; Pepsi-Cola Bottling Co. of Los Angeles, supra.

The Board has held that it will prohibit electioneering at or near the polls. Clausson Baking Company, 134 NLRB 111 (1964). And, it will set aside an election based on prolonged conversations between representatives of a party and employees in line to vote. Milchem Inc., 170 NLRB 362 (1968). However, the Board has held that electioneering is not objectionable where it occurs outside the employer's building, 10 feet away from where voters were standing in line to vote, separated by a closed set of doors. Boston Insulated Wire & Cable Co., 259 NLRB 1118 (1982).

Here the Petitioner conducted rallies. At Sacramento Boulevard it was urging employees entering the plant to vote yes. This was at a time prior to the polling period at an area approximately 50 feet from the polling place. There was no evidence that this electioneering intruded into the polling place during the polling period.

At Carroll Street the rally was not being held to urge employees to vote for the Petitioner but rather was in the form of a pep rally for supporters before the ballot count. I make this conclusion based on the fact that only one employee entered the front entrance of the Carroll Street facility and the rest of the employees had to have entered through the back or side doors near the parking areas.

Neither Carroll Street nor Sacramento Boulevard where the electioneering took place had been designated as "no electioneering" areas. Marvil International Security Service Inc. 173 NLRB 1260 (1968).

Based on the foregoing, I do not believe the electioneering which occurred here constituted objectionable conduct affecting the results of the election. Boston Insulated Wire & Cable Co., supra.

With respect to the incident involving Canamar and Zdzairski at Carroll Street, there is very little dispute on facts. As noted above, I do not credit Zdzairski's testimony that stones were thrown at him as he entered and left the facility. I do credit Zdzairski and Canamar that a small object was thrown at the van they were in as

they left. There is no alternative but to conclude that the object was thrown by someone in the group and thus attributable to the Petitioner whose agents were present. However, this action involved only two employees out of 540, occurred after they had voted, and could not have been disseminated among any employees as this was the last polling session and only polling place open.

I do not believe that this type of conduct would have a coercive effect on the employees to cause them to vote for the Petitioner. The Board and Courts have held that not only must that conduct be coercive but it must be so related to the election as to have had a probable effect upon the employees' actions at the polls. The Great Atlantic and Pacific

Tea Company, Inc., 177 NLRB 942 (1969); NLRB v. Zelrich Company, 344 F.2d 1011, 1015 (C.A. 5, 1965).

Based on all of the foregoing, I shall recommend that Employer's Objection (e) be overruled in its entirety.

Objection (f)

In this Objection, the Employer contends that there existed inconsistent standards and enforcement of Board directives regarding polling place conduct by the parties. This Objection involves the conduct of two Board agents at the Carroll Street polling site on the day of the election. During the morning pre-election conference one-half hour before the 6:30 a.m. polling session at Carroll Street, Employer Production Manager Kyle testified that he sent foreman Balark to the Carroll Street

entrance, which is adjacent to the polling site, to wait for an interpreter who was scheduled to be present on behalf of the Board during the polling session. Kyle testified that when he told Board Agent Matress what he had done she said it would not be acceptable to have a supervisor outside the polling area watching as it could be construed as spying on the polling place. Kyle then recalled Balark.

Kyle also testified that during the evening pre-election conference at Carroll Street he told Employer Director of Human Resources Bob Brueck and Employer Counsel Richard Lapp that he was concerned about people assembled across the street from the entrance to the Carroll Street facility. Lapp in turn told Board Agent Standish that a group of

people was assembling outside. Kyle testified that Standish replied that as long as the people were not adjacent to the polling place he (Standish) had no problem with it. Kyle further testified that Lapp then told Standish that morning Matress had had a problem with a supervisor being out front of the Carroll Street facility and that Standish shrugged his shoulders. Kyle also testified that no Board agent went out to speak to assembled people.

There was no evidence that any employees were aware of both of these discussions with the Board agents. Kyle testified that when the conversation took place between Lapp and Standish only the parties' representatives and observers were present. Brueck testified that he could not hear what Standish said.

Kyle's testimony, with respect to these conversations, is unrefuted and is to be credited.

The Board has historically defined the "voting area" as the place where votes are cast and the area where employees line up to vote. Milchem Inc., 170 NLRB 362 (1968); Star Expansion Industries Corporation, 170 NLRB 364 (1968); Harold W. Moore d/b/a Harold W. Moore & Son, 173 NLRB 1258 (1968); Jilts, Inc. d/b/a Golden Years Rest Home, 289 NLRB 1106 (1988).

In Glacier Packing Co., Inc., 210 NLRB 571, at 573 (1974) the Board held that "Board agents conducting elections may therefore delineate an area within which electioneering is prohibited; they must exercise their judgement as to what constitutes electioneering activity; and

they are required to take reasonable measures to restrict electioneering activity which comes to their attention, consistent with their other obligations." (emphasis supplied) In view of the fact that the assembled people were off the Employer's property and across the street from the Employer's plant, it cannot be argued that those people were within the "voting area." In such circumstances, I would not find that Board Agent Standish's reply to Lapp constitutes any deviation of Board precedent or policy regarding the conduct of elections. Indeed, the Board's Casehandling Manual (Part Two) Representation Proceedings, Section 11326.4 states that in some "...exceptional situations..." the Board agent may designate an area in which electioneering is forbidden; but it

cautions that the agent must not set up such an area that cannot be policed. Had Standish ruled that there could be no electioneering in the area across the street from the plant, he would be responsible for policing that area. Such a task would have required him to leave the polling place during the election to do that policing, as testimony clearly reflects that the voting room windows were covered to prevent anyone from seeing in or out.

Board Agent Matress' conduct in telling Kyle that the supervisor standing at the entrance to the plant next to the voting area could appear to be watching voters is neither inconsistent with Standish's remarks nor an improper comment. The Board has long held that it is improper for supervisory personnel to

engage in surveillance or to give the impression of surveillance of the voting activities of employees. Cavern Supply Company, Inc., 203 NLRB 583,588 (1973); fn 5; Belk's Department Store of Savannah, Georgia, Inc., 98 NLRB 280 (1952).

Based on the foregoing, I see nothing inconsistent in the remarks of Board Agents Standish and Matress who, in my opinion, properly responded to both situations as called for by Board policy in conducting elections. Furthermore, in the absence of any evidence that employees eligible to vote were aware of these discussions, they could not have had any effect on the outcome of the election in any event.

Accordingly, I shall recommend that Employer's Objection (f) be overruled.

Objection (g)

In this Objection, the Employer alleges that the Petitioner made promises and granted benefits in exchange for employee support. However, in its memorandum of law the Employer makes no arguments in support of this Objection. The alleged waiver of $300 fee for signing an authorization card could be considered a promise of and granting of a benefit; however, I will address this issue under Objections (c) and (h) as the Employer contends this action constituted threats of fines.

The only other matter which could arguably constitute alleged promises and granting of benefits concerns Petitioner organizer Alicia Padilla's statements made at organizing meetings. These, too, will be addressed under Objections (c)

and (h) as the Employer contends Padilla's statements were also threats.

Accordingly, I shall recommend Employer's Objection (g) be overruled.

Objections (c) and (h)

In these Objections the Employer alleges that employees were threatened with loss of jobs or other economic disadvantage if they did not vote for the Petitioner and that the Petitioner engaged in threatening and coercive conduct which undermined the laboratory conditions for an election.

These Objections involve several allegations involving numerous witnesses. I will address them individually first and then consider the overall impact.

The $300 Fine

The Employer contends that the Petitioner organizing committee members

told other employees that if they did not sign authorization cards they would be fined $300. Maria Martha Correa testified that employee Ismelda Chacon told her that people who did not sign the card would be fined $300 and that those that did not sign cards could even lose their jobs. Correa testified that this statement was made in a van during a ride to or from work with other employees. During her testimony Correa could not state when this comment was made or who was present in the van. On cross-examination Correa could not recall any more of the conversation, whether she replied to Chacon, how many were in the van, whether it was morning or afternoon, how many times Chacon spoke about the Petitioner's campaign, or how many times

she, herself, spoke about the Petitioner's campaign.

Maria Luisa Esquivel[7] testified that Teresa Velazquez, an employee, told her if she did not sign a card she would be charged $300. Esquivel stated that she was told this by her sister who allegedly passed on a phone message received in a telephone call from Velazquez and that she was also told this in person on a visit by Velazquez to Esquivel's mother's home. On cross-examination Esquivel was a very reluctant witness. She was hesitant and unresponsive to questions and, by my observation, appeared unwilling to answer questions.

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[7] The Official transcript of this proceeding lists the spelling as Esquidel in some places. Both of the parties' memoranda of law and my notes reflect the correct spelling as Esquivel.

John Canamar testified that he was told by Jose Amparo Rosales that cards were available from the Petitioner and those that did not sign before the Petitioner came in would be charged $300 and people that signed would not be charged anything. He also testified that another employee, Renee (the witness did not recall the last name), was present and repeated this statement. Canamar stated he responded to the two by saying he did not know what was going to happen.

Ismelda Chacon testified that she rode in a van to work with eight or nine others including Maria Martha Correa prior to Chacon's transfer to another plant. Chacon also testified that those riding in the van discussed the Petitioner and signing Petitioner cards. Chacon denied saying if employees did not

sign a card they could be fined or charged $300 or that she or the Petitioner could cause employees to lose their jobs. Chacon further testified that she had heard from employees that the Employer was showing movies at the 501 North Sacramento facility which indicated that the Petitioner was going to charge $300. Chacon's testimony was forthright. On cross-examination she was responsive to questions, did not exhibit any hesitancy, but rather demonstrated a readiness to answer. Based on my observation of her demeanor, I credit the testimony of Ismelda Chacon. I do not credit Maria Martha Correa, whose testimony reflects she had a very poor memory and failed to demonstrate a willingness to answer questions.

Teresa Velazquez testified that she never talked with Maria Luisa Esquivel about signing a Petitioner card and she never told Esquivel if she did not sign a card she would be charged $300. Velazquez also testified that she does not know Esquivel's sister's phone number and doesn't know where she lives. She also testified that she does not know Esquivel's mother or where she lives. Velazquez testified that she has not talked to Esquivel other than to say good morning. Velazquez testified that she never asked anyone if they signed a card for the Petitioner.

Based on my observation of both witnesses, I credit the testimony of Teresa Velazquez. She was self-assured and responsive to questions on cross-examination as well as on direct

examination. Maria Luisa Esquivel's testimony, on the other hand, was characterized by a hesitancy to answer questions in a direct, forthright manner.

Jose Amparo Rosales testified that John Canamar came to him and asked about the benefits of the Petitioner and Rosales told Canamar if he wanted he could sign a card for the Petitioner then come to the meetings. On cross--examination Rosales testified that he heard in a movie shown by the Employer that the Petitioner could charge $300 or more if they did not sign a card.

Rosales' testimony was very direct and responsive to the questions put to him. His testimony on cross-examination was characterized by the same forthrightness that he demonstrated on direct examination. He was very

self-assured and his answers never appeared to be evasive. Rosales was on the witness stand for approximately two and one-half hours and demonstrated this bearing throughout his testimony. At no time did his testimony reveal any inconsistencies. Based on my observation of his demeanor and his testimony, I credit the testimony of Jose Amparo Rosales.

Based on the foregoing credibility resolutions, I find that the Employer has failed to establish that the Petitioner or any of its agents or organizing committee members ever told employees that they would be fined or charged $300 if they did not sign authorization cards for the Petitioner.

Other Pre-election Threats

The Employer also alleges in these Objections that employees were threatened with loss of their jobs if they did not support the Petitioner, that they would be "screwed" if they did not vote for the Petitioner, and that employees would "suffer the consequences" if they did not sign a card for the Petitioner.

Martha Gutierrez testified that she and other employees were called "chicken" because they did not support the Petitioner. She also testified that she was ordered to sign a card for the Petitioner by Ismelda Chacon and Rocio Rodriguez. She further stated that a couple of weeks after she took the card from Chacon and Rodriguez, she was called

by Rodriguez who told her she should sign the card or suffer the consequences.

Chacon and Rodriguez both testified that they spoke to Gutierrez at the unemployment compensation office in February and Chacon asked Gutierrez if she had filled out a card and she said no. Rodriguez gave Gutierrez a card and told her to fill it out, and if she wanted to send it by mail that it did not need a stamp. Rodriguez testified that she did not telephone Gutierrez about the card. She testified that the last time she saw Gutierrez was at the unemployment compensation office in February. She testified she does not know Gutierrez' telephone number or her address.

Based on my observation of the witnesses, I credit the testimony of Chacon and Rodriguez. I credit Chacon

for the reasons set forth above. Rodriguez' testimony demonstrated a very good recollection of specific dates and times, and she appeared willing to answer questions. I do not credit Gutierrez' testimony on this Objection for the same reasons stated under Objection (b). I do not believe that Chacon or Rodriguez "ordered" Gutierrez to sign a card or that Rodriguez called Gutierrez and told her to sign a card or she would suffer the consequences.

Maria Luisa Esquivel testified that Ismelda Chacon told her and other employees in the Punch Press Department if they did not sign a card they would be "screwed." She testified that Chacon shouted this out as the punch press employees were returning to their department from a meeting. Chacon

testified that she never made such a remark.

I will credit Chacon and will not credit Esquivel with respect to this allegation, based on the same factors as described above, as well as on the fact that despite the assertion that Chacon's remark was shouted to a group of employees only one witness testified. Therefore, I find that Chacon did not tell employees they would be "screwed" if they did not sign a card for the Petitioner.

Alicia Padilla's Threat

Manuela Collazo testified that Alicia Padilla, the Petitioner's lead organizer in this campaign, told those present at a Petitioner meeting she attended, if the Petitioner did not come in that the employees could lose their

jobs. Collazo, in response to a question by Employer Counsel "Did anybody else say these things to you?" responded by saying Jose Galvan (TR 434-435). However, there was no further testimony as to what Galvan allegedly said to Collazo, where or when it occurred.

On cross-examination, Collazo testified that at the Petitioner's meetings Padilla explained the Petitioner would try to negotiate better salaries, benefits and job security. She also testified that Padilla said she was not sure she could get better working conditions but she would try. Collazo went on to testify that Padilla said "...if we supported the Union that the people that had been laid off that she would try to get them in again." And that Padilla explained if employees did

not have a union that a company can fire or lay off employees if it wants (TR 443-446).

Alicia Padilla testified that Collazo asked her if the employees could lose their jobs if the Petitioner lost the election. Padilla testified that she told Collazo that if she had "...no one to fight for your rights or no protection such as a union contract anything can happen. You can lose your jobs, you can get brought down to minimum wage. There is nothing that really protects an employee except minimum wage rates that the government has set up." (TR 830).

Based on the expanded testimony of Collazo on cross-examination it is clear that the comment made by Padilla was not as simple as the Employer would have it. Based on the testimony of both witnesses,

Padilla did not simply state that if the Petitioner were not elected the employees would lose their jobs. Rather, the testimony reflects that Padilla was urging support for the Petitioner because she believed it would mean better job security. Even Collazo's testimony indicates that Padilla did not promise increased benefits if the Union were voted in, but said she would try to get them in negotiations. I will credit this portion of Collazo's testimony on cross-examination as it relates to Padilla's comments. I also credit Padilla's testimony. Although the two versions are not identical, I believe them to be the witnesses' recollections of what was said on this topic.

The statements of Padilla that employers can fire or lay off employees

anytime it wants, when taken in the context of her statements that the Petitioner would seek to improve employees working conditions including job security through negotiations, do not amount to a threat, but rather constitute campaign propaganda which employees are capable of recognizing for what it is. Shopping Kart Food Market, Inc., 228 NLRB 1311, 1313 (1977); Midland National Life Insurance Company, 263 NLRB 127, 132 (1982). Furthermore, even if it could be construed as a threat, it was made by someone who did not have the power to carry it out and is at most an accusation against the Employer. Otis Elevator Company, 114 NLRB 1490, 1492 (1955).

Based on the foregoing credibility resolutions and findings of fact, I do not find that the Petitioner or any of

its agents or supporters, or any employees acting on their own threatened employees with fines, or that they would be "screwed" or would suffer the consequences or with any other undesirable conditions if they did not vote for the Petitioner, sign a card for the Petitioner or support the Petitioner. Accordingly, I do not believe there existed an overall atmosphere where employees exercise of their free choice in a fair election was impossible. I shall, therefore, recommend Objections (c) and (h) be overruled.

Conclusion

The Employer summed up its Objections contending that under the totality of the circumstances the conduct alleged in its Objections prevented a free election from being held.

The Board recently reaffirmed its decision in Baja's Place, 268 NLRB 868 (1984), that in evaluating whether employees could freely and fairly exercise their choice in the election, the Board evaluates the following factors: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of

misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. Phillips Chrysler Plymouth, Inc., 304 NLRB No. 7 (1992).

In view of my credibility resolutions and findings of facts set forth above under each Objection, I do not believe that there existed misconduct which, under the Phillips Chrysler Plymouth test, interfered with the employees' free and fair exercise of their choice in the election conducted herein.

Accordingly, for the reasons stated herein, based on my credibility resolutions and findings of fact, I recommend that the Employer's Objections

5(a) through 5(h) be overruled in their entirety, and that, as the Tally of Ballots shows that the Petitioner has received a majority of the valid ballots cast, the Petitioner be certified as the collective bargaining representative of the employees in the unit involved herein.

In accordance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party may, within fourteen (14) days of the issuance of this Report file with the Board in Washington, DC eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party so filing shall serve a copy thereof upon the other party, and shall file a copy with the Regional Director. A statement of service shall be made to the Board

simultaneously with the filing of exceptions. In the absence of filed exceptions in accordance with the above, the Board may decide the matter forthwith upon the record or may make other disposition of the case.

DATED at Peoria, Illinois, this 2nd day of July, 1992.

R. J. Symkowiak, Hearing Officer
National Labor Relations Board
Region Thirty-Three
16th Floor - Savings Center Tower
411 Hamilton Boulevard
Peoria, Illinois 61602

CERTIFICATE OF SERVICE

Being the Hearing Officer in this case, I hereby certify that a copy of this Hearing Officer's Report and Recommendations on Objections was served by postpaid certified mail, return receipt requested, upon each of the following named persons by depositing a copy thereof in an envelope properly addressed to each of them in the United States Post Office at Peoria, Illinois on July 2, 1992.

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APPENDIX E

A Yes, I did.

Q Where were the people located?

A Some across on the parkway putting the pennants on the ground, the rest assembling at the driveway at the north end of the building.

Q That would be at the 601 location?

A Correct.

Q What were the people doing that were assembling on the driveway at the 601 location?

A When I first observed them they were just standing around and talking.

Q At the time there were people on the driveway which you observed or whom you observed out your window, were other people attempting to drive into the driveway to come to work?

A Yes, that was a little later on.

Q What time was that?

A Approximately 6 o'clock.

Q What did you see around 6 o'clock?

A The crowd was much larger outside, much more vocal. Cars were coming in and they were slowing down or stopping, and pennants were being handed to the people who rolled down their windows as they drove in. People were being very vocal.

Q Did you-say they were stopping cars or cars stopped on the way into the plant?

A They were waving the pennants, hitting the windshield. Cars would stop and they would roll down the window, and pennants would be passed in or some sort of conversation would be exchanged.

Q When you say they were waving pennants, whom are you referring to when you say they?

A The people that assembled at the north end of the driveway.

Q At some point at about 6 a.m., did agents from the National Labor Relations Board arrive at the plant?

A Yes. It was right around that time, shortly after that time.

Q At that time did you see anyone outside the entrance to the plant at 601?

A Yes, I did.

Q Were you able to identify that individual at that time?

A Well, the two that I first

recognized were Alicia Padilla and Jose Galvan. They were some of the employees that I recognized.

Q Was there anyone else that you noticed that was by the entrance at that time?

A Yes, there were several people.

Q Did you notice anything unusual about any of the people that were standing outside the door at that time?

A There was one gentleman who I did not recognize who had

A He was in the street.

Q And do you recall the direction Mr. Galvan was facing when you saw these flashes from the camera go off?

A He was facing east.

Q During this third trip outside, did you see any cars moving on Carroll Street?

A Yes.

Q Do you recall what those cars were doing?

A One car had pulled up in front of the polling place and parked directly in front of where those doors were that you had me identify.

Q What happened next?

A Someone got out of the car and went into the polling place.

Q Did anything happen while that person was getting out of the car and going into the building?

A Mr. Galvan was still taking pictures.

Q Facing east at that time?

A Correct.

Q When you were outside on this third visit outside, did you hear anything?

A Yes.

Q What did you hear?

A The people across the street yelling pretty much the same stuff that I had spoken about previously.

Q The other times you were at the front door, right?

A Not during the election.

Q I understand that. The times other than between 10:30 and 11:30 you were standing at the front door?

A Yes.

Q When was the first time that you noticed what you believe was a camera flash?

A The first time that I walked out.

Q And that was what time?

A 10:40 or something like that.

Q Where did the flash come from?

A From in front of the polling place where the people had assembled.

Q The people were assembled on the north side of the street?

A They were assembled from the center of the street to the north side, yes.

Q So, you are saying that people were

standing in the middle of the street?

A At times they were out close to the middle of the street. I was quite a distance away I couldn't see if they were exactly in the middle but they were close to the middle of the street.

Q Most of the crowd most of the time were standing across the street from the building, isn't that correct?

Q Did you see anyone with a camera?

A Yes.

Q Were you able to identify that person?

A Yes. Mr. Galvan.

Q Did Mr. Galvan take pictures with the camera?

A He was taking pictures for people.

Q Which direction was the person taking pictures facing when he took the pictures?

A Across to the other side of the building.

Q I am not sure what you mean to the other side of the building.

A Not in the back of the building. Across the building.

Q Was that person facing north?

A Yes.

Q Did anyone take your picture?

A Yes. At that time when me and Tony

Harrera were standing at the window looking out the window, the person who was taking pictures of people in the street turned around very fast and took a picture of us.

Q What makes you say that person took a picture of you?

A Because we were standing in a dark room, and we saw the flash. Blinding.

Q Did you see any vehicles when you looked out the tool room windows?

A Yes. There were many cars, and many people were outside.

A Yes.

Q When you were entering that entrance at 601, did you see anyone outside the building at that time?

MS. BRANNIGAN: Objection. Repetitive. Duplicative, burdening.

HEARING OFFICER SYMKOWIAK: It is overruled.

Q BY MR. LAPP: Did you see anyone outside the building at the 601 location when you drove your Bronco in the driveway?

A Yes.

Q How many people did you see?

A About six or seven people.

Q What were those people doing?

A Shouting with posters like if it were a strike, not like if it were voting..

MS. BRANNIGAN: Objection. Move to

strike.

HEARING OFFICER SYMKOWIAK: Granted. I will grant the motion to strike.

MR. LAPP: I guess I am not sure why --

HEARING OFFICER SYMKOWIAK: From the point of her testimony where she ended with the words that they were shouting and that they were with posters. From that point on I would grant the motion to strike.

Q BY MR. LAPP: What did the posters say?

A When I went to drop off my riders, I can explain. I came in through the entrance where one enters inside the company.

A They went into the factory.

Q Did these people act in any way or say anything to make you think that they were afraid?

MS. BRANNIGAN: Objection.

HEARING OFFICER SYMKOWIAK: Sustained.

MR. LAPP: Well, she can at least characterize what they were doing that made her think that way can't she?

HEARING OFFICER SYMKOWIAK: She can --

MR. LAPP: If they were flinching or if they said something or if they, I don't know what it would be, but I am after the conduct.

MS. BRANNIGAN: If I may, Mr. Hearing Officer, the subject of reactions of employees are not relevant to the --. This witness has not been shown to be a psychologist, a mind

reader, or one expert reading body language. What she saw or what she believes she saw and how she believe the other employees reacted I don't understand how it could be within her understanding. It is not relevant. It is hearsay.

HEARING OFFICER SYMKOWIAK: Do you have any response to that, Mr. Lapp, before I make a ruling?

MR. LAPP: I think it would be relevant to know if these people were afraid. It goes to several of the objections. How this witness will understand it is what I am trying to figure out by asking her did they do something to make you think that they were afraid, and if they did, what was it.

to get the union in. She also said that even Elias had told her that the union would be good for the people.

MS. BRANNIGAN: Excuse me. Even who? Even what? Even what said?

THE WITNESS: Elias.

HEARING OFFICER SYMKOWIAK: Is that someone's name?

THE WITNESS: Yes.

HEARING OFFICER SYMKOWIAK: Elias.

Q BY MR. LAPP: Who is Elias?

A I know he is one of the supervisors. They call him a foreman.

Q They call him a foreman? Do you know his last name?

A Diaz.

Q Did you say anything in response to Ismelda Chacon?

A No, because I was shocked. I didn't think --

MS. BRANNIGAN: Objection.

HEARING OFFICER SYMKOWIAK: The objection is sustained. I will just cut off your answer there.

Q BY MR. LAPP: Why didn't you say anything to Ismelda Chacon?

MS. BRANNIGAN: Objection, not relevant.

HEARING OFFICER SYMKOWIAK: Same ruling. It is the same thing.

MR. LAPP: She didn't say anything. I want to know why. It is not relevant to know why she didn't say anything?

HEARING OFFICER SYMKOWIAK: I don't think it is pertinent. It is what she was thinking about. I certainly think it is irrelevant.

MR. LAPP: Well, I don't.

(Pause)

Q BY MR. LAPP: Mrs. Banks - Mrs. Grant. I apologize. Did you have any conversations with anyone else, any other Lakewood employees regarding the union?

A I talked to several others.

Q Did you have any conversations with any labor employees about voting?

A Yes.

Q Do you recall who you had that conversation with or those conversations with?

A I talked to Gloria. I talked to Elsa. I talked to my supervisors. A lot of people.

Q Can you tell me when you had the

conversation with Gloria?

MS. BRANNIGAN: Can we have some identification of who Gloria is?

MR. LAPP: I think she has already testified --

HEARING OFFICER SYMKOWIAK: It is the same Gloria.

Q BY MR. LAPP: Is this the same Gloria that you testified about earlier?

A No, there are two Glorias. One works over on the

743 of the International Brotherhood of Teamsters, correct?

A Yes, I am.

Q How long have you been with the Union?

A About a year and a half now.

Q What is your position with the Union?

A I am an organizer.

Q You have been present in the hearing room for these several days of hearing on the Employer's Objections in this case?

A Yes, I have.

Q Did you have any responsibility for the Union's organizing campaign concerning the Lakewood Engineering employees?

A Yes, I did.

Q Could you tell us briefly what type of responsibilities you had and what type

of activities?

A Many of my responsibilities were to open the polls in the morning and to close the polls when they were supposed to be closed. Basically that is what my job was.

Q What type of activities if any did you organize or participate in during the campaign before the election itself?

A We had a little rally, take a little pictures.

Q Were you involved in the organizing campaign at any time before the election day itself?

A Further north of the building. He was on the other side of the drive on the north side.

Q On the north side of the driveway?

A Right.

Q You said that Rico Cristo gave back the camera to you.

A Correct.

Q Did you give him the camera to begin with?

A I did. I gave it to him the day before the election because he knew he was taking pictures.

Q How did he know he was taking pictures?

A He was asked by myself and Alicia if he could help us out with that in the morning.

Q You wanted him to take pictures in the morning?

A Yes, sir.

Q Did you also ask him to take pictures in the afternoon?

A In the afternoon also, yes.

Q Did he take pictures in the morning?

A Since I wasn't there, after I left I would assume he did.

MS. BRANNIGAN: Objection to the assumption.

HEARING OFFICER SYMKOWIAK: Sustained.

Q BY MR. LAPP: Did you ever talk to him about whether he took pictures in the morning?

A Yes, I did.

Q What did he tell you?

Q So I must be wrong.

A He gave it back to me at the Sacramento location later that afternoon.

Q At about 4 o'clock?

A Give or take a few minutes.

Q Whose camera was it?

A It belongs to our union, the Union I should say.

Q Where were you standing when you were taking pictures the night of April 3?

A I was standing directly across the street on the north side, the northeast side. I would say from the entrance, about 25 feet east and directly across the street.

Q The entrance to Carroll Street?

A Yes, sir.

Q Where you in the street?

A Yes, I was.

Q Where in the street were you?

A Across the street. I was sometimes in the middle of the street and across the street where the cars were parked, in between the cars. I was standing there also.

Q Across the street means the north side of the street?

A The north side of the street.

Q Did you move around at all or did you stay in the same place?

A Yes, I did. I moved around.

was much crisper than if you take them at night. He said no, Rico, they are probably damaged completely if it has been exposed in the middle of the roll, and that is what it was.

Q Other than opening the polls at Sacramento in the morning, did you participate in opening or closing polls at any other times during that day?

A Yes, I did. I went back to 601 Sacramento and I opened it up I believe for the 3:00, I believe. I know it was in the afternoon. I had opened it and also had closed it. I know I had to come back - It was 5:00 when I came back. My assistance for the day was no longer needed so I went home.

Q So you opened Sacramento in the morning --

A With Alicia Padilla.

Q And you opened and closed

Sacramento in the afternoon.

A By myself.

Q Do you know who closed the morning session at Sacramento?

A We had come back to close that.

Q Who is we?

A I am sorry, myself and Alicia Padilla.

Q When you were at the 601 end of the building on Sacramento in the morning, did you have the camera around your neck?

A Yes. It had, I don't know what they call them. You know, a cord. There is a name for them though.

would constitute as far as yelling or shouting. There was a lot of laughing.

Q When you were at the facility taking photographs, did you notice any cars driving into the driveway by the Lakewood Engineering building?

A Yes.

Q Would you estimate how many?

A Quite a few. Do you want numbers?

Q If you can.

A Maybe 30, 35.

Q Did you take any pictures of those cars?

A No.

Q Did you take any pictures of the people in the cars?

A No.

Q Where were you and the employees standing in relation to the drive, the cars you used?

A We were on the northwest side where

the mustard factory begins. It is kind of hard to describe. You pull in and then right here is the mustard factory where the two things, where the trucks back up to get deliveries. We were like over on this side. So when the people came in, the drivers would be on our side. Does that help any?

Q Yes, thank you.

A If you were driving a car you would be on our side. And there was no way you could have two cars going in and out.

Q You said that you didn't take any pictures of any cars entering Sacramento?

A No.

Q Were any cars in the background of any picture you took?

A Perhaps on Sacramento Boulevard when they were standing on the boulevard itself, the grass area when I was taking pictures. Not that I recall in any of the eight. The only thing that was taken insofar as automobiles, and I remember myself saying, because I remember this is another thing you don't do, was just vehicles that were my car, which is an '86 Chevrolet, and Alicia's Plymouth, and there was a Buick. Later that morning a Buick pulled up just for a short period of time.

Q Whose Buick was that?

A One of the employees. I don't know if they were on the committee or what,

but one of the employees. They just pulled up to talk to someone real fast in front of the mustard company and then went down, drove down the parkway.

Q Was the building in the background of any pictures you had taken, that Sacramento building?

A No.

Q Was the driveway to the building in the background of any pictures you had taken?

A No. The reason why I never went to even the other side where the building was to take the pictures was it is in

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In the Supreme Court of the United States

OCTOBER TERM, 1994

LAKEWOOD ENGINEERING & MFG. CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the conduct of union representatives in photographing union supporters participating in union rallies on the day of a Board-supervised election, and in photographing two employees who were observing one of the rallies, did not, under the circumstances of this case, tend to interfere with the employees' free and uncoerced choice in the election.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is unpublished, but the decision is noted at 28 F.3d 1216 (Table). The decision and order of the National Labor Relations Board (Pet. App. 41a-56a) is unreported, but the decision is noted at 143 L.R.R.M. (BNA) 1191. The underlying decision and certification of representative (Pet. App. 57a-150a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1994. The petition for a writ of certiorari was

filed on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in the production of portable electric fans, heaters and chair swivels at several locations in Chicago, Illinois. Pet. App. 45a. On February 4, 1992, the Union[1] filed a petition with the regional office of the National Labor Relations Board (Board) for an election in a unit of petitioner's approximately 540 full-time production, maintenance, tool room, and warehouse employees. Petitioner and the Union thereafter entered into a stipulation, approved by the Board's Regional Director, to hold an election in the unit on April 3, 1992. *Id.* at 62a-64a. The election was conducted on that date at four of petitioner's locations, including its Sacramento Boulevard facility, where the polls were open from 6:30 a.m. to 8:00 a.m. and from 3:00 p.m. to 5:00 p.m., and its Carroll Street facility where the polls were open from 6:30 a.m. to 7:30 a.m. and from 10:30 p.m. to 11:30 p.m. *Id.* at 66a.

Beginning about 5:30 a.m. on election day, eight to 12 pro-Union employees and Union representatives gathered on the sidewalk adjacent to the driveway at the Sacramento Boulevard facility, where they waved Union banners and urged employees to vote for the Union. Pet. App. 8a-9a. Rico Cristo, a Union representative, took photographs of this group of Union supporters; he did not, however, photograph employees entering the driveway or anyone other than those Union supporters. *Id.* at 112a.

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[1] Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, a/w International Brotherhood of Teamsters, AFL-CIO.

At the Carroll Street facility, a group of approximately 20 pro-Union employees and Union representatives gathered across the street from the entrance to the plant from about 9:45 p.m. until the polls closed at 11:30 p.m. At this rally, a pro-Union employee used a megaphone to ask the group how they had voted, to which the group responded "Teamsters"; music was also played on a car radio. Pet. App. 5a, 89a, 97a. The event, however, was not held to urge employees to vote for the Union, but was instead in the nature of a pep rally for Union supporters prior to the ballot count. *Id.* at 5a. Jose Galvan, a Union representative present at the rally, took photographs of Union supporters, which later appeared in a Union publication. *Id.* at 117a. Galvan also took one photograph of two other employees not involved in the rally, who were watching the rally from an unlit tool room at the Carroll Street facility. *Id.* at 93a-94a, 116a-117a.

2. The Union won the election by a vote of 312 to 197, with 37 challenged ballots. Pet. App. 3a. Petitioner filed objections to the election, including an allegation that, in photographing employees as described above, the Union had destroyed the atmosphere necessary for a free and fair election. *Id.* at 27a, 114a-115a.

After an evidentiary hearing, the Board's hearing officer recommended that the Board overrule petitioner's objection and certify the Union as the employees' collective bargaining representative. Pet. App. 148a-149a. The hearing officer explained that the Union's photography did not constitute objectionable conduct because (with the exception of the single photo of the two employees in the unlit tool room) the Union photographed only Union supporters participating in pro-Union rallies and, further, because the photographs had

been taken for use in a Union publication. *Id.* at 116a-118a.

The Board adopted the hearing officer's recommendation and certified the Union as the employees' collective bargaining representative. Pet. App. 57a-61a. Citing its decision in *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223 (1992), the Board concluded that "the photos taken of employees voluntarily attending a Union rally are not objectionable," particularly in light of the Union's legitimate, noncoercive explanation for taking the photographs. Pet. App. 59a n.1. The Board added that "the single photo taken of two employees observing the rally from the darkened toolroom was an isolated event that does not warrant setting aside the election." *Ibid.*[2]

When petitioner subsequently refused to bargain, the Union filed an unfair labor practice charge. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding. The Board granted summary judgment, finding that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to bargain with the Union. Pet. App. 12a-13a, 41a-56a.

3. The court of appeals enforced the Board's order in an unpublished opinion. Pet. App. 1a-40a. The court

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[2] The Board also overruled petitioner's objection that the Union supporters and representatives who conducted the rallies at the Sacramento Boulevard and Carroll Street polling sites had threatened and intimidated employees. Pet. App. 57a-61a, 119a-122a. The court of appeals affirmed the Board's determination, *id.* at 17a-27a, and petitioner does not challenge that aspect of the court's decision here.

affirmed the hearing officer's finding that, except for the two employees in the darkened toolroom, "the subjects of the [Union's] photographs were all Union supporters attending a rally." *Id.* at 35a-36a. Although the court found it "troubling" that the Union had not "offer[ed] an explanation for the photography at the time the pictures were being snapped," the court noted that the Union had offered a legitimate explanation for the photography at the hearing. *Id.* at 37a. The court agreed with the Board that it would be inappropriate to set aside the election, for the Union's photography had not intimidated, coerced, or influenced the employees' exercise of free choice at the polls. *Id.* at 38a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner suggests (Pet. 13-26) that the Board should have set aside the election because the Union did not give the pro-Union employees whom it photographed at the Union rallies a contemporaneous explanation as to why it was photographing them. There is no merit to that contention.

Where parties to Board elections are alleged to have engaged in misconduct, the Board will set aside the election if, under the circumstances presented, that "conduct reasonably tends to interfere with the employees' free and uncoerced choice." *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736, 736 (1988). Accord *Sunbelt Mfg.*, 308 N.L.R.B. 780, 780 n.3 (1992), enforced mem., 996 F.2d 305 (5th Cir. 1993). As the Board explained in *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223, 224 (1992), a union's photographing of employees who

voluntarily attend a union-sponsored function (there, a picnic luncheon) does not tend to interfere with employee free choice, since no reasonable employee so photographed would conclude that the union had taken the photographs for the purpose of future retaliation. Photographs of willing participants in union activity, the Board explained, are distinguishable from photographs taken of employees whose union sentiments may be unknown or who oppose the union, for such photographs readily suggest a retaliatory purpose. *Ibid.* (discussing *Pepsi-Cola Bottling Co.*, *supra*, and *Mike Yurosek & Son, Inc.*, 292 N.L.R.B. 1074 (1989)). Applying the analysis set forth in *Nu Skin Int'l*, the Board reasonably concluded that in this case the Union's photographing of pro-Union supporters participating in Union rallies was not objectionable conduct. Pet. App. 58a n.1, 38a.[3]

Contrary to petitioner's submission (Pet. 17-19), the Union's photographing of its supporters at the rallies was not objectionable simply because the Union did not give those employees a contemporaneous explanation for

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[3] Petitioner asserts (Pet. 14) that the Board and the court of appeals overlooked "undisputed evidence that one of the union organizers took pictures of employees at the Sacramento Boulevard plant as they came to work." See also Pet. 17, 22-23. Petitioner's argument is premised on a mischaracterization of the record. As the Board's hearing officer found (Pet. App. 112a), "there was no evidence that [Union representative] Cristo took photographs of employees entering the driveway or anyone other than the [Union's] supporters" at the Sacramento Boulevard plant. The excerpts from Cristo's testimony referenced by petitioner (see Pet. 14 & n.3) are consistent with the hearing officer's finding. In any event, whether this record provides substantial support for the hearing officer's conclusion that the Union photographed only pro-Union employees who were participating in the Union's rally is a fact-bound question that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

its action. Photographs by a union of pro-union employees are not coercive regardless of whether the union has offered the employees a reason for taking them. See *Nu Skin Int'l*, 307 N.L.R.B. at 224-225. Moreover, even where the conduct at issue is less innocuous, the Board will consider explanations tendered by the union at the Board hearing in determining whether, under all of the circumstances, the conduct tended to interfere with employee free choice. See *Mike Yurosek & Son, Inc.*, 292 N.L.R.B. at 1074 (Board considered union's explanation at hearing for photographing anti-union campaign activity but rejected it as not credible); *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. at 736-737 (Board noted that union had offered no explanation at hearing for videotaping employees as they were being offered union leaflets).

2. Petitioner also contends (Pet. 20-22) that the Board should have set aside the election on the basis of the Union's single photograph of the two employees who were observing the Carroll Street rally from the darkened tool room. According to petitioner, the Board's conclusion that the single photograph amounted to an isolated incident that did not warrant setting aside the election, is inconsistent with the principle that "to evaluate properly the probable effect of conduct which is coercive in nature, * * * the number of employees directly involved cannot * * * serve as [a] determinative factor." Pet. 21, quoting *Intercontinental Mfg.*, 167 N.L.R.B. 769, 770 (1967). Contrary to petitioner's suggestion, there is no conflict between the Board's decision in this case and its holding in *Intercontinental Mfg.*

In *Intercontinental Mfg.*, the Board found that the employer's conduct during the election campaign was

coercive. 167 N.L.R.B. at 770.[4] Upon that finding, the Board rejected the hearing officer's conclusion that the employer's conduct did not warrant setting aside the election because it had affected only six of over 700 employees eligible to vote. Here, by contrast, the Board concluded that in the circumstances of this case the photographing of the two employees in the darkened Carroll Street tool room was not objectionable conduct. Pet. App. 38a, 58a-59a n.1.[5] That conclusion is amply supported by the evidentiary record.

First, since these two employees had already voted earlier in the day (see Gov't C.A. Br. 16-17), their electoral choice could not possibly have been influenced by the Union's subsequent photographing of them, which occurred sometime between 9:45 and 11:30 that evening. Pet. App. 66a, 89a. Second, the record does not establish that either employee told any co-worker who had not yet voted that the Union had taken his picture. Third, the record does not show that any employee who voted at the Carroll Street polling site observed the Union representative in the act of photographing the two employees.[6] On these facts, the Board was justified in

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[4] In *Intercontinental Mfg.*, shortly before the election, company officials, among other things, told an employee that, if the union won, the company would no longer be able to release him from his normal duties to permit him to make deliveries, and told two employees that the company considered them "enemies" so long as they wore union insignia. 167 N.L.R.B. at 769-770.

[5] While petitioner suggests (Pet. 23-25) that the Board "reli[ed] on the Union's victory margin to somehow excuse the Union's misconduct," that allegation finds no support in the record.

[6] Indeed, it appears quite unlikely that any voter could have witnessed the challenged conduct. The Union conducted its rally across the street from the front entrance to the Carroll Street plant, an entrance used by only one employee during the evening

not setting aside the election based on the single photograph taken of the two employees in the darkened tool room.

3. Finally, petitioner contends (Pet. 27-40) that the court of appeals' decision conflicts with that court's own precedents, and with those of the Board, in that the court held that petitioner must produce "subjective evidence that the [Union's] picture-taking was intimidating in fact" (Pet. 27-28) in order to set aside the election. As an initial matter, any conflict between the decision in this case and other decisions of the Seventh Circuit is a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957). On the merits, petitioner's argument cannot withstand scrutiny, because it mischaracterizes the context and significance of the quoted language.

The court of appeals did not reject petitioner's challenge to the election for lack of evidence of the employees' subjective reactions to the Union's photography. Rather, the court agreed with the Board that the photography in this case did not justify setting aside the election, in light of the hearing officer's findings that virtually all of the photographs were of Union supporters and that the pictures had been taken for publication in the Union's newsletter. Pet. App. 34a-38a. While the court did note (*id.* at 36a) that petitioner had not produced "any eyewitnesses to testify that he or she was concerned or made to feel uncomfortable by the Union's picture-taking," that reference does not reflect,

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voting session, as the rest of the employees entered through back or side entrances where no Union supporters or representatives were present. Pet App. 94a, 119a. Moreover, the conduct in question was both brief and unannounced—"Galvan turned quickly and took a picture" (*id.* at 93a).

as petitioner suggests (Pet. 27-28), that the court viewed such evidence as necessary for a finding of coercion. The court's remark was made in the context of comparing the facts of this case with those in *Nu Skin Int'l*, where the Board found challenged photography not coercive despite the testimony of two employees that they were "concerned" and "felt funny" about being photographed. See Pet. App. 36a (quoting *Nu Skin Int'l*, 307 N.L.R.B. at 224).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER IN REPLY

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ARGUMENT

In its response,[1] the Government makes the following assertions: (1) no conflict exists between the Seventh Circuit decision and any other court of appeals decision; (2) no contemporaneous explanation for the use and display of a camera by Union agents on election day is necessary when the photographs are taken only of union supporters; and (3) the Seventh Circuit's reference in its opinion to the lack of subjective evidence on the employee's reactions to

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[1]The Brief for the National Labor Relations Board in Opposition will be hereinafter cited as "Gov. Br. ___." The Petition for Writ of Certiorari will be hereinafter cited as "Pet. App. ___").

the Union's photography was meaningless. Each of these assertions are wrong.

To begin with, the Seventh Circuit decision is directly at odds with the Board's precedent established in *Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736 (1988), and later recognized by the Eighth Circuit in *Millard Processing Services, Inc. v. NLRB*, 2 F.3d 258, 263 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 922 (1994). In *Pepsi-Cola*, the Board stated that the use of a camera by Union agents without contemporaneously explaining the purpose for the picture-taking to the employees would "reasonably tend to interfere with employee free choice in the election."

Pepsi-Cola, 289 N.L.R.B. at 737. Here, it is undisputed that Union officials Jose Galvan and Rico Cristo provided no explanation to the voters when they openly displayed and used a camera during the election at polling places located at Petitioner's Sacramento and Carroll Street facilities. Pet. App. at 29a - 30a.

The Government, however, would excuse all that as harmless, asserting that the Union merely has to concoct an after-the-fact explanation to somehow negate the intimidating effect of this activity on the voters.[2] The

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[2] The Seventh Circuit noted that the Union did not provide a reason for its photography until five weeks after

Government's reasoning overlooks the obvious point that the voters were not privy to this supposed benign purpose at the time of the election.

The Government also cites *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223 (1992), for the proposition that "photographs by a union of pro-union supporters are not coercive regardless of whether the union has offered the employees a reason for taking them" (Gov. Br. 7). The union in *Nu Skin*, however, did supply a contemporaneous explanation for the

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the election, "allowing the Union plenty of time to come up with a justification for its actions." Pet. App. 37a. The Court characterized the Union's explanation that the photos were intended to be used in the Union newsletter as "dubious." Pet. App. at 27a.

picture-taking. In *Nu Skin*, the union took photographs of employees who voluntarily attended a union-sponsored luncheon the day before the election. *Nu Skin*, 307 N.L.R.B. at 223. The union agents reassured the employees that the camera was there to "remember this fun-filled memory" of the luncheon and joked that they would all "make the front page of USA Today." *Id.* at 225. The Board concluded under these circumstances that the "Union's photographing of employees enjoying a voluntarily attended picnic does not reasonably suggest . . . [a retaliatory] purpose." *Id.* at 224.

Unlike *Nu Skin*, the display and use of the camera outside the two polling

places on three separate occasions on election day was no photo session at a union-sponsored picnic. The record establishes that Petitioner's employees at its Sacramento facility were involuntarily subjected to a Union-led crowd, armed with pennants and a megaphone, who congregated around the entrance to the narrow driveway used by the employees on the morning of the election to report to work and cast their votes. Pet. App. at 7-8. In the midst of this commotion, Cristo was strategically positioned on the driver's side of this entranceway while taking pictures of the scene. Pet. App. at 14. In fact, Cristo testified at the hearing

that he pointed his camera in the direction of the driveway while at least thirty-five cars entered. Pet. App. at 14 n.3.

Moreover, Galvan walked around sporting a 35-millimeter camera throughout the evening voting period at the Carroll Street facility. Pet. App. at 18. Galvan snapped several flash shots at the front entrance of the Carroll Street facility which led to the polling place, including one time when an employee exited a car and entered the building. Galvan also photographed at least two Lakewood employees in the tool room of the Carroll Street facility. *Id.*

The Government would excuse the tool reason incident as innocuous because the two employees had already voted. Significantly, however, the record relied on by the Government (Gov. Br. 8) does not support its assertion that the two employees had voted prior to the incident. There is nothing in the record which even indirectly addresses the issue of their voting. Furthermore, the Government's assertion that these employees had to tell their co-workers about the incident ignores the reality that the open use and display of the camera by Union agents throughout the election day ensured widespread

dissemination of the Union's surveillance activities.[3]

The Government's dismissal of the tool room incident through an empty recitation of the facts in *Intercontinental Mfg. Co.*, 167 N.L.R.B. 769 (1967) does not undermine the applicability of the Board's ruling in that case here. In *Intercontinental Mfg. Co.*, the Board held that "to evaluate properly the probable effect of conduct which is coercive in nature, the number of instances of interference, or the

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[3]In fact, as the Seventh Circuit noted, the Hearing Officer failed to make any findings as to whether Galvan's picture-taking of the two employees had a coercive effect on other employees. Pet. App. at 8a.

number of employees directly involved, cannot serve as determinative factors." 167 N.L.R.B. at 770. Despite the standard established in *Intercontinental Mfg. Co.*, the Board and the Court dismissed the tool room incident as isolated because it involved one photograph of only two employees.

Finally, the Seventh Circuit's statement about the lack of any testimony on the subjective reactions of employees to the Union's picture-taking was not simply an idle and meaningless comparison to *Nu Skin*. On the contrary, the Court characterized Petitioner's lack of subjective evidence as a *failure*. Pet App. at 36a. A further indication that

the lack of subjective evidence played a role in the Court's analysis was its pronouncement that it will not tolerate "photography that intimidates, coerces, or influences voters in labor elections." Pet. App. at 38a. The Court's warning suggests that photography must be coercive in fact for a finding that such conduct interfered with employee free choice.

In short, the Seventh Circuit insinuates that it would have reached an opposite result had Lakewood been successful in admitting subjective evidence.[4] By looking for evidence of

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[4]Lakewood attempted to introduce subjective evidence at the hearing but was not permitted to do so because of the

the employees' subjective reaction to the picture-taking, the Seventh Circuit not only ignored Board precedent, but also created a conflict among the Circuits. *See, e.g., Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991), *cert. denied*, ___ U.S. ___ 112 S. Ct. 912 (1992) (the proper analysis is whether the remark had a "tendency to coerce" not whether it was in fact coercive); *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1364 (9th Cir. 1981), *cert. denied*, 454 U.S. 835 (1981) (no requirement to present

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Board's longstanding principle "that it is impermissible to consider employee subjective reactions to determine whether employees have been threatened or coerced." *Van Leer Containers, Inc. v. NLRB*, 943 F.2d 786, 789 (7th Cir. 1991).

"evidence of actual intimidation"); *NLRB v. Brookwood Furniture, Division of U.S. Indus.*, 701 F.2d 452, 459 (5th Cir. 1983)(proper standard is tendency "to be coercive, not whether the employees are in fact coerced"). The very presence of the Union camera throughout the voting periods at Sacramento and Carroll Street tainted the election day atmosphere with a not so subtle impression of Union surveillance and a threat of reprisal.

CONCLUSION

The Seventh Circuit's decision, unlike other circuit courts, sends a message to both unions and employers that the use and appearance of photographic surveillance on election day is

acceptable as long as the challenged party comes up with a good enough excuse for this activity weeks after the election. Moreover, the Court effectively raised the standard of proof in election challenges by requiring evidence of the employees' subjective reactions to the Union's picture-taking. The Government cannot minimize the importance of these two issues by characterizing them as a quibble over factual findings. Rather, Petitioner is asking the Court to set a single standard for all jurisdictions on the use of cameras by either employers or unions during representation elections to ensure

that employees can make a free and uncoerced choice.

Respectfully submitted,

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